96-1737

Supreme Court, U.S.
FILED
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No. _____

IN THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 1995

VINCENT A. LUCAS

Petitioner,

v.

E. GORDON GEE, et al.

Respondents.

On petition for writ of certiorari to the Court of Appeals for Franklin County, Ohio

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PETITION FOR WRIT OF CERTIORARI

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105pp

QUESTIONS PRESENTED FOR REVIEW

1. May a state appellate court hold that a plaintiff's First Amendment claims were not properly before it or the trial court, and that the trial court need not consider the First Amendment arguments made by that plaintiff in his memoranda opposing dismissal, on the ground that the plaintiff did not specifically state in his *pro se* complaint that his claims were based on a First Amendment legal theory, when the rulings of at least eleven of twelve regional federal court of appeals circuits and of that state's Supreme Court hold that a pleader need only plead the facts, and not the legal theory, on which he bases his claims?

2. If a Complaint alleges that the presiding officer of a state governmental body deprived members of that body their right to speak at a meeting of that body by "us[ing] the power of the chair to suppress debate which opposed his position on whether [the proposed administrative code change being considered was] consistent with the U.S. Constitution," by various rulings he made as presiding officer, including a ruling excluding from debate the subject of the constitutionality of the proposed code change, is that Complaint sufficient to state a claim of deprivation of the right to speak under the free speech clause of the First Amendment as made applicable to the state actors by the Fourteenth Amendment?

3. Must a state court follow this Court's standards for the federal courts regarding the sufficiency of a non-lawyer's *pro se* complaint, to the extent those standards are more lenient than that state's standards, when determining whether a *pro se* complaint has sufficiently pled a federal claim?

4. If a complaint seeks declaratory relief that an enactment of a governmental body is void and injunctive relief which would prevent the presiding officer of that body from violating the First Amendment rights of members of that body, does the case for injunctive relief become moot when a second governmental body independently reenacts the same enactment that was the subject of the declaratory relief sought, even though that second body's reenactment would not deter that presiding

officer from violating the constitutional rights of members of first governmental body in the future?

5. Ohio Rule of Civil Procedure 41(B)(4) states that a dismissal for lack of subject matter jurisdiction cannot operate as a dismissal on the merits. Did the court of appeals err in affirming the trial court's dismissal "with prejudice" of Petitioner's case when the court of appeals expressly found that the trial court lacked subject matter jurisdiction to consider the merits of Petitioner's case?

VINCENT A. LUCAS
Petitioner,

v.

E. GORDON GEE, JAMES NICHOLS, and
THE OHIO STATE UNIVERSITY
Respondents.

Prayer for the Writ of Certiorari

Petitioner, Vincent A. Lucas, respectfully prays for a writ of certiorari to review the judgment of the Court of Appeals, Tenth Appellate District, Franklin County, Ohio entered in this case on June 1, 1995.

Respectfully Submitted,
VINCENT A. LUCAS
Petitioner, pro se

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The decision of the Ohio Supreme Court denying discretionary review and dismissing the appeal as not involving any substantial constitutional question was reported in 655 N.E.2d 738 and 74 Ohio St. 3d 1418. The decision of the Ohio Supreme Court denying rehearing of its decision denying review was reported in 656 N.E.2d 1300 and 74 Ohio St. 3d 1465.

The statutory basis of jurisdiction

The Franklin County Court of Appeals entered its decision on June 1, 1995. (App. 1a). Review of the Ohio Supreme Court was timely sought and was denied on October 18, 1995. (App. 24a). Petitioner timely moved for a rehearing on the Ohio Supreme Court ruling denying review and that motion was denied on November 22, 1995. (App. 25a). On February 2, 1996, Justice Stevens extended the time within which to file a petition for certiorari in this case to April 20, 1996. This petition was filed within that period of time.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257, since review is sought of a "[f]inal judgment[] or decree[] rendered by the highest court of a State in which a decision could be had ... where ... [a] right ... is ... claimed under the Constitution ... of ... the United States."

Constitutional provisions, statutes, ordinances, and regulations involved in this case.

U.S. Const., Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend. XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Rule of Civil Procedure 8(A)

Claims for relief. A pleading that sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled. * * *

Ohio Rule of Civil Procedure 8(F)

Construction of pleadings. All pleadings shall be so construed as to do substantial justice.

Ohio Rule of Civil Procedure 12(B)

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted * * *. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a

claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided, however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

Ohio Rule of Civil Procedure 15(A)

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Ohio Rule of Civil Procedure 41(B)(4)

A dismissal for (a) lack of jurisdiction over the person or the subject matter, or (b) for failure to join a party under Rule 19 or Rule 19.1 shall operate as a failure otherwise than on the merits.

Ohio Rule of Civil Procedure 56

Summary judgment.

(A) For party seeking affirmative relief. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of the time permitted under these rules for a

responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings thereon. The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion. If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and

what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(F) When affidavits unavailable. Should it appear from the affidavits of a party opposing the motion for summary judgment that he cannot for sufficient reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable

attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Ohio Rule of Civil Procedure 65(D)

Form and scope of restraining order or injunction. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding upon the parties to the action, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of the order whether by personal service or otherwise.

Ohio Revised Code § 2305.01 (Baldwin 1994)

The court of common pleas has original jurisdiction in all civil cases in which the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts and appellate jurisdiction from the decisions of boards of county commissioners.

* * *

Ohio Revised Code § 3345.011 (Baldwin 1994)

"State university" means a public institution of higher education which is a body politic and corporate. Each of the following institutions of higher education shall be recognized as a state university: * * * Ohio state university * * *.

Ohio Admin. Code § 3335-19-02(f)

All senate meetings shall be open to the public.

Ohio Admin. Code § 3335-19-05

Proposals, measures, and resolutions shall be introduced on the senate floor by members of the senate only. Members of the university community who are not members of the senate may be granted the right to speak, but not to vote, on matters before the senate. When a request is made for this privilege, the chair shall ask the senate for objections and,

hearing none, shall grant permission to speak. If objections are raised, the privilege shall be extended only by an action of the senate.

I. The question of whether a pleading is sufficient to raise a federal claim is a federal question

The question of whether a pleading is sufficient for a pleader to pursue federal claims, which is the central focus of the questions presented for review, is inherently a federal question.

> Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.

First Nat'l Bank v. Anderson, 269 U.S. 341, 346 (1926). *Accord, e.g., Covington & Lexington Turnpike Rd. Co. v. Sandford*, 164 U.S. 578, 595 (1896) ("When a party specially sets up and claims a right or privilege under the Constitution or laws of the United States, the question of the sufficiency of allegations to present that issue is not concluded by the view expressed by the state court. ... 'The question whether a plea sets up a sufficient defence, when the defence relied on arises under an act of Congress, does present, and that necessarily, a question of Federal law...' "); *Brown v. Western Ry. of Alabama*, 338 U.S. 294, 295 (1949) (rejecting argument that the construction of a complaint by the state court is binding on this Court; "A long series of cases previously decided, ... , makes it our duty to construe the allegations of [a] complaint ourselves in order to determine whether petitioner has been denied a right" granted by federal law.).

This question was adequately presented at every stage of litigation in this case, as is evident from the following Statement of the Case.

STATEMENT OF THE CASE

This case is a First Amendment challenge to the actions of Ohio State University President E. Gordon Gee in not permitting members of one of that University's principle policy-making bodies, the University Senate ("Senate"), to discuss the constitutionality of a proposed change in the sexual harassment policy in Ohio State's Code of Student Conduct, when that body

debated whether to enact the policy change at its April 9, 1994 meeting. The Code change had been the subject of widespread criticism at the University for several months prior to the April 9 meeting by several student groups and Ohio State law professor David Goldberger as being an unconstitutional campus speech code. Prior to the April 9 senate meeting, the Petitioner, a graduate student member of the Senate, submitted a twelve page memorandum to the Senate attacking the proposed Code change on constitutional grounds[1] and submitted a proposed amendment, the stated purpose of which was to correct constitutional defects of the proposed Code change.[2] Respondent E. Gordon Gee presided over the April 9 Senate meeting. Gee was a strong supporter of the proposed Code change and he expressed his opinion that the Code change was constitutional at the outset of Senate debate. Gee became rather displeased when several student members of the Senate moved to postpone consideration of the Code change to another Senate meeting and openly expressed his animosity towards those students both verbally and by a series of actions he took as presiding officer that were to the detriment of his opponents[3] that clearly violated the Senate's rules of procedure.[4] When the motion to postpone and another motion were defeated and Senate debate turned to the merits of the Code change, the Petitioner attempted to ask Ohio State legal counsel Steven McDonald some questions regarding the Code change's constitutionality. Gee quickly interrupted the Petitioner, ruled that for the purposes of further Senate debate the Code change would be considered constitutional, and that therefore the subject of the Code change's constitutionality would be excluded from Senate debate.[5] Given that Gee's opponents based their opposition to the proposed Code change almost entirely on its unconstitutionality, Gee's ruling gagged his

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[1]Nichols Aff. ¶ 3

[2]Lucas 3d Aff. ¶ 2. (App. 53a)

[3]Complaint ¶ 9(b) (App. 51a)

[4]Complaint ¶¶ 8(c)-(e); 9(b), (c) (App. 49a)

[5]Lucas 3d Aff. ¶ 1 (App. 53a); Complaint ¶¶ 8(f),(g); 9(c). (App. 50a) See also the account of the Senate meeting contained in the April 11, 1994 issue of The Lantern. (Lucas 4th Aff. ¶ 4).

political opponents from discussing why they opposed the Code change.

The Petitioner thereafter presented his proposed amendment to the Code change but could not discuss its merits in any detail because of Gee's ruling. The amendment was defeated. Senate debate quickly came to an end after the ruling, and the Code change was approved.

Shortly after the meeting, the Petitioner filed this lawsuit in the Franklin County Court of Common Pleas against Gee; the senate's parliamentarian James Nichols; and Ohio State. The Petitioner's Complaint was based largely on state law claims, namely, that Gee violated the Senate's rules of procedure in his attempt to strongarm the Code change through the Senate. However, the Complaint also contained the Petitioner's claim that he had been deprived of his right of speak at the meeting, although the legal theory on which he originally based his claims was a state law theory. The Petitioner alleged, among other things, that "E. Gordon Gee [contrary to the Senate's rules] ... ruled that any debate on the legality under the U.S. Constitution of the [Code change being considered] was out of order," Complaint ¶ 8(f), that "Gee ... used the power of the chair to suppress debate which opposed his position on whether [the Code change] is consistent with the U.S. Constitution," *id.* ¶ 9(b), and that he did this to gain a tactical advantage over his political opponents, namely, to influence "the outcome of votes taken in the Senate," *id.* ¶ 9. The Petitioner sought an injunction requiring Gee to comply with the Senate's operating rules, declaratory judgment that the votes of the Senate regarding the Code change were void, and attorney's fees.

The Respondents moved to dismiss under Ohio R. Civ. P. 12(B)(6) claiming Petitioner failed to state a claim because under Ohio law the judiciary lacks power to hear claims that the presiding officer of a legislative body violated that body's rules of procedure. The Petitioner challenged this assertion in his Memorandum Opposing Dismissal and also raised in pp. 5-8 of his Memorandum Opposing Dismissal his First Amendment legal theory for his claim that he was deprived the right to speak. (App. 26a). Since Petitioner's claim entailed a violation of the federal constitution, the judiciary clearly does have power

to hear his claim. *See, e.g.*, 42 U.S.C. § 1983.[6] The trial court converted the Respondents' motion to dismiss to a motion for summary judgment. The Respondents filed a supplemental memorandum arguing, *inter alia*, that the Petitioner's complaint was not sufficient to pursue his First Amendment theory for his claims. The Petitioner in his Supplemental Memorandum Opposing Dismissal argued that his Complaint was sufficient for him to pursue his First Amendment claims --- the Complaint alleged facts which established that his First Amendment rights were violated and that it was irrelevant that his First Amendment legal theory was not explicitly contained in the Complaint. (App. 29a).

The trial court dismissed on the grounds that (1.) the case had become moot because Ohio State's Board of Trustees subsequently adopted the same Code change the Senate enacted (Decision of August 10, 1994 at 3 (App. 20a)); (2.) the requested declaratory relief would be of no effect because the Ohio State's Board of Trustees had previously enacted a policy similar in scope; and (3.) the courts "lack[] jurisdiction to review or interfere with the internal procedures and proceedings of a legislative body." *Id.* at 4 (App. 21a).

On appeal, the Petitioner raised the dismissal of his First Amendment claims as his first assignment of error: "The trial court erred in dismissing the First and Fourteenth Amendment issues of this case," Assignm. Error, Court of Appeals. (App. 32a), and briefed at length in that court the merits of the First Amendment claims and the sufficiency of the Complaint to raise these claims. Appellant's Br. at 10-26. The Court of Appeals held that it could not review whether "[t]he trial court erred in dismissing the First and Fourteenth Amendment issues of this case" purportedly because "plaintiff did not raise these questions in the trial court" and "[First and Fourteenth Amendment] claims were [not] advanced by plaintiff in the trial court," Decision of June 1, 1995 at 4-5. The court of appeals apparently believed either that the Petitioner never raised his

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[6]The Franklin County Courts of Common Pleas are courts of general original jurisdiction, Ohio Rev. Code § 2305.01, that have jurisdiction to hear cases seeking injunctive relief against persons who violate federal constitutional rights under the color of Ohio law, *Schwartz v. Board of Trustees of Ohio State Univ.*, 510 N.E.2d 808 (Ohio 1987).

First Amendment arguments in the trial court or that First Amendment claims are not properly raised unless a party states in his pleadings that his claims are based on the First Amendment. If the former is true, the Court of Appeals ruling is based on a plain factual error which was not made because of any fault of the Petitioner --- The Petitioner's appellate brief made clear that the Petitioner had advanced his First Amendment theory for his claims in the trial court. Appellant's Br., Ct. App., at 25 (App. 34a). Indeed, the Respondents had even conceded in that court that the Petitioner had raised his First Amendment theory in the trial court. Appellees' Br., Ct. App., at 5. (App. 34a). The Petitioner moved for reconsideration to bring this apparent error to the court's attention,[7] but the court of appeals denied the motion and chastised the Petitioner for pointing out this apparent factual error in their decision.

Petitioner's First Amendment claims and the sufficiency of the complaint to raise them were raised in the Ohio Supreme Court in Petitioner's Propositions of Law, 1 through 5, (Appellant's Mem. in Support of Jurisdiction, Ohio Supreme Ct., at i-ii (App. 38a)), and adequately briefed in that court, (Mem. Supp. Juris. at 3-7 (App. 41a)). The Ohio Supreme Court denied review without comment.

Petitioner also properly raised as an issue and argued in all the courts below that the Board of Trustees' independent adoption of the same policy enacted by the Senate did not render moot the injunctive relief sought, requiring Gee to comply with the Senate's rules of procedure.[8] The court of appeals however affirmed the trial court's ruling that the Trustees' June 3 enactment of the Code change the Senate enacted rendered the case entirely moot. (App. 7a).

The Court of Appeals decision does not rest on any adequate and independent state ground.

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[7]Motion for Reconsideration, Court of Appeals, at 4-6.

[8]Pl.'s Supplem. Mem. Opposing Dismiss. 2 (Trustees' independent enactment of the policy "would in no way effect the dispositive effects of [the] injunctive ... relief ..."); Assignm. Error No. 3, Ct. App. (App. 33a); Appellant's Br., Ct. App., at 36-9; Proposition of Law No. 7, Ohio S. Ct. (App. 40a); Mem. Supp. Juris., Ohio S. Ct., at 8-9 (App. 46a).

The court of appeals appears to have refused to address the Petitioner's First Amendment arguments on the ground that they were not raised in the trial court. If this ground were actually **true**, it might constitute an "adequate and independent state ground" barring review. This ground is not adequate because it is simply not true. As shown above, the Petitioner raised his First Amendment arguments in the trial court and throughout the proceedings below. This Court's jurisdiction cannot be evaded by a "non-federal ground [] so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation Dist. v. Farmers' Mut. Canal Co.*, 243 U.S. 157, 164 (1917).[9]

The court of appeals ruling also suggests that it may have refused to address whether the First Amendment claims were properly dismissed on the ground that the trial court did not consider the Petitioner's First Amendment theory for his claims in its dismissal ruling. Even if this were true, it would not constitute an adequate state ground. As shown above, the Petitioner squarely put before the trial court his First Amendment theory for his claims, and hence the trial court was obligated to consider these claims when it made its ruling. A state court may not refuse to consider a party's assertion, properly put before it, that he has been deprived of federal rights, without a "valid excuse," *Howett v. Rose*, 496 U.S. 356, 369 (1990), and such a refusal is just as reviewable and reversible by this Court as an erroneous ruling by that court on that federal question, *Lawrence v. State Tax Comm'n of Mississippi*, 286 U.S. 276, 282 (1932).

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[9]*Accord, e.g., Lawrence v. State Tax Comm'n of Mississippi*, 286 U.S. 276, 282 (1932) ("Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided."); *Leathe v. Thomas*, 207 U.S. 93, 99 (1907) (state ground not adequate if "palpably unfounded"); *Radio Station WOW v. Johnson*, 326 U.S. 120, 129 (1945) (state ground not adequate if "it is an obvious subterfuge to evade consideration of a federal issue").

Petitioner's argument that his Complaint is entitled to be held to less stringent standards than those drafted by lawyers is properly before this Court

Although the question of whether the Petitioner's pleadings are sufficient to raise his first amendment claims is unquestionably properly before this Court, the Respondents have argued below that the Petitioner must be held to the same standards that lawyers are held to because he did not specifically argue in the trial court that he was entitled to greater liberality in his pleadings as a *pro se* pleader under this Court's standards in *Haines v. Kerner*, *Estelle v. Gamble*, and other cases.[10]

Their argument is simply misguided. The argument regarding the liberality afforded *pro se* pleadings does not involve a question different or distinct from the question of the sufficiency of the pleadings but is nothing more than additional legal argument regarding that question. It has long been recognized that parties may raise additional legal arguments in this Court regarding federal questions raised below.

> If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued.
>
> Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.

Dewey v. Des Moines, 173 U.S. 193, 197-8 (1899) (emphasis added). *Accord Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Bankers' Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 78 n.2 (1988).

In Ohio, "all pleadings are to be construed so as to do substantial justice." Ohio R. Civ. P. 8(F). If a party did not specifically argue in the trial court that his pleadings should be construed so as to do "substantial justice," would this mean that the party is not entitled to substantial justice in the construction

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[10]*See* Reasons for Granting the Writ, Section III, *infra* for a discussion of the holdings of those cases.

of his pleadings. Of course, not. In jurisdictions such as Ohio whose pleading rules strive to do substantial justice, it is elementary common sense that *pro se* pleaders are afforded a certain amount of leeway from the technicalities of pleading. Withholding this right to liberal treatment for no other reason than that the pleader did not specifically ask for it in the trial court makes no more sense than withholding substantial justice from a party because they did not specifically ask for it below.[11]

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[11] In any event, it is simply irrelevant whether Petitioner's *pro se* argument was raised in the trial court because the court of appeals considered and passed upon the "*pro se*" argument with the Respondents' implicit consent. While the June 1 opinion of the court does not specifically mention the argument, a careful examination of the record reveals that the argument's merits were considered by the court in its judgment. The court of appeals ruling on Petitioner's Motion for Reconsideration specifically states that all issues raised in the motion for reconsideration were "fully considered" by the court in its ruling. (App. 12a). The Petitioner's *pro se* argument was clearly in, among other briefs, his Motion for Reconsideration (at 9-10, App. 37a), and the Respondents did not object to the consideration of this argument at any point in the court of appeals. Therefore this argument must have been considered in the court of appeals decision of June 1.

This Court's "elementary rule [is] that it is irrelevant to inquire ... when a Federal question was raised in [the] court[s] below when it appears that such question was actually considered and decided" by the highest state court in which a decision could be had. *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 124 (1914); *Orr v. Orr*, 440 U.S. 268, 274 (1979); *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974).

Finally, Respondents might attempt to argue that the Ohio Supreme Court *might* have denied discretionary review in part because it believed the Petitioner's "*pro se*" argument was not properly before it. Nothing in the record would suggest this is so. However, even if it were true, this would not be an adequate state ground because it is wholly inconsistent with Ohio's prior practices. Ohio's courts of appeals have broad discretion to consider issues raised on appeal not raised in the trial court. *C. Miller Chevrolet v. Willoughby Hills*, 313 N.E.2d 400 (Ohio 1974); *State v. 1981 Dodge Ram Van*, 522 N.E.2d 524 (Ohio 1988). When an issue not raised in the trial court is considered on its merits by the court of appeals, the Ohio Supreme Court has in the past considered the issue to be properly before that court, unless the court of appeals abused its discretion in considering the issue. *C. Miller Chevrolet*. Given that the Respondents did not object in any way in the court of appeals to the consideration of the *pro se* argument, the court of appeals certainly did not abuse its discretion in considering the argument. Since the Ohio Supreme Court has traditionally considered issues considered by the court of appeals to be properly before it, a refusal of that court to consider the *pro se* argument on the ground it was not raised in the trial court, cannot be an adequate ground on which to object to this Court's consideration of the argument. "[O]nly a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court."

Petitioner has researched this issue and found not a single case in which a federal court has held that a *pro se* pleader must be held to the same standards as lawyers because that pleader did not ask for more liberal treatment in the trial court and the Respondents were able to cite no such cases below.

The Petitioner continues to have standing to seek injunctive relief in this case.

The Respondents have argued that the Petitioner lost his standing to seek injunctive relief inhibiting Gee from violating the First Amendment rights of participants in future Senate meetings on the ground that the Petitioner is no longer a member of the Senate. In order for them to prevail on this ground, they must satisfy the "heavy burden" of demonstrating that " 'there is no reasonable expectation that the wrong will be repeated' " by the Respondents against the Petitioner. *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). The trial court however found that, as a member of the university community, the Petitioner could still participate in Senate meetings, and hence had standing to seek injunctive relief.

> Defendants correctly point out that Plaintiff is no longer a member of the University Senate. As a consequence, he cannot vote in future meetings of the University Senate. Notwithstanding that, Plaintiff can participate in such meetings; hence, plaintiff has standing to seek prospective [injunctive] relief in this cause. Defendants' Motion for Summary Judgment on this issue is **DENIED.**

Trial court decision, Aug. 10, 1994, at 3-4. (App. 20a). Although the Respondents attempted to raise the issue as an "additional assignment of error" in the court of appeals, the court of appeals refused to address the issue on the ground that the Respondents had not cross-appealed the issue as they were required to do under Ohio law. (App. 9a).

The trial court's finding of fact that the Petitioner would be able to participate in future Senate meetings, from which

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Ford v. Georgia, 498 U.S. 411, 423-4 (1911). "[S]tate procedural requirements which are not strictly or regularly followed cannot deprive [this Court] of the right to review." *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). "Novelty in procedural requirements" cannot deprive party of this Court's review. *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 457 (1958).

followed the finding of law that Petitioner has standing, should be given due deference in light of that court's greater familiarity with the full record of this case, especially in light of the general maxim that this Court does not retry issues of fact determined by state courts.[12] The finding is also supported by the great weight of evidence in the record. The university's administrative code expressly gives members of the university community the right to make a general consent motion to speak at Senate meetings. Ohio Admin. Code § 3335-19-5.[13] Even if the Petitioner were never granted permission to speak at another senate meeting, his First Amendment rights would still be concretely and realistically threatened by Gee's practices in presiding over the Senate because the First Amendment affords certain protections not only to speech itself but to the manner in which permission is obtained to speak at meetings of state governmental bodies. Gee, for example, cannot refuse to recognize the Petitioner for the purposes of asking permission to speak, in an effort to prevent the Petitioner from expressing his views. If the Petitioner requests permission to speak, Gee cannot apply a different set of rules than those that are applied to any other person asking permission to speak, for no other reason but to adversely affect the outcome of the Petitioner's request. These are more than merely speculative possibilities --- the crux of the Petitioner's complaint was that Gee had repeatedly abused his power as presiding officer, through a variety of procedural maneuvers, to deprive his political opponents of their right to express their views on the Code change that was the subject of the Senate's consideration.

Moreover, the irrefuted evidence in the record reveals that the Senate has an informal tradition of freely granting permission to speak to anyone who wishes to speak. The minutes of the meetings of the Senate reveal that during the first six[14] meetings of the 1993-94 school year the Senate allowed at

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[12]*Portland Ry., Light & Power Co. v. Railroad Comm'n of Oregon*, 229 U.S. 397, 412 (1913); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952); *Grayson v. Harris*, 267 U.S. 352, 358 (1925).

[13]All senate meetings are open to the public. Ohio Admin. Code § 3335-19-02(f).

[14]The Senate met nine times that school year. The minutes of the first six meetings are the only ones in the record because they were the only ones the

least nineteen non-senators permission to speak in twenty-seven separate instances and show that there was not a single incident in which a non-senator was denied permission to speak. Lucas 4th Aff., Exhibits 4 and 7.[15] Steven McDonald, counsel of record for the Respondents, himself, has addressed the Senate at least once although he is a non-Senator. Given this tradition of the Senate of freely granting permission to speak to non-senators, it is extremely probable that the Petitioner could obtain permission to speak at some future Senate meeting. Respondents therefore failed to demonstrate that "there is no reasonable expectation that the wrong [sought to be enjoined] will be repeated," and hence, the Petitioner has the requisite standing.[16]

Petitioner had in his possession as of the date of the trial court's hearing on Respondents' motion to dismiss.

[15]Those people were:

Caroline Whitacre
Thomas Milburn
Don M. Dell (in 7 instances)
Linda Tom
Timothy Jost
Carol Bininger
Nancy Rudd (in 2 instances)
Steven Summerhill
William Samm
Ronald St. Pierre
Berhard Mulligan (He addressed the Senate in 2 separate instances, although his second appearance does not appear in the Senate minutes submitted.)
Franklin J. Pegues
Herb Asher
Susan Huntington
Katherine Meyer
Kathleen Carberry (She addressed the Senate in 2 separate instances, although her second appearance does not appear in the Senate minutes submitted.)
Angela Ostrom
Marcus Sandver
Jot Carpenter

[16]In the event the Court determines that the Petitioner no longer has standing, this Court should vacate the judgment below as moot so that the judgment cannot have any possible *res judicata* effect. *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936); *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93-4 (1979).

REASONS FOR GRANTING THE WRIT

Introduction

Read literally, the court of appeals decision holds that the Petitioner's first amendment arguments were not before it because they were never raised in the trial court. Under this interpretation, the court of appeals ruling is premised on "facts" clearly contrary to the facts of this case and should be summarily reversed. The Respondents interpret the Court of Appeals ruling differently -- as merely a ruling on the sufficiency of the pleadings; in which case, the Court of Appeals upheld the dismissal with prejudice of valid First Amendment claims not because the Petitioner failed to allege sufficient facts which, when proven, would demonstrate that his First Amendment rights had been violated and not because he did not raise his First Amendment legal theory in the trial court in his memoranda opposing dismissal but only because the Petitioner did not specifically state in his Complaint that his claims were based on the First Amendment. In short, certiorari should be granted because it is unconscionable to allow a trial court to dismiss with prejudice First Amendment claims for no other reason than because a *pro se*[17] pleader put his First Amendment legal theory for his claims in his memoranda opposing dismissal instead of his Complaint --- especially when that pleader's state Supreme Court as well as at least *eleven of twelve* regional federal court of appeals circuits have held that pleaders are not required to plead the legal theory on which they base their claims. It is also contrary to the pleading principles of this Court in *Conley v. Gibson, Haines v. Kerner, Estelle v. Gamble,* and other cases. Certiorari should be granted not only to enforce this Court's precedents but because a ruling on this case could be a significant national precedent, particularly for other *pro se* pleaders seeking to bring federal claims in state courts, that might prevent countless other meritorious civil rights cases from being dismissed without ever having a hearing on their merits, as is detailed in Section IV, *infra.*

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[17]The Petitioner has no formal legal training and had no litigation experience prior to his case.

I. The court of appeals' holding that the Petitioner's First Amendment claims were not properly before it or the trial court because the Petitioner did not plead in his Complaint that the legal theory on which he based his claims involved the First Amendment, conflicts with the decisions of at least *eleven of twelve* regional federal court of appeals circuits and the Ohio Supreme Court.

A. The Ohio Supreme Court and federal courts of appeals have uniformly held that pleaders need only plead facts, not legal theories.

Under long-standing Ohio law, a pleader is not required to plead the legal theory for his claims, and a complaint will be held sufficient if it pleads sufficient facts to state a claim under *any possible legal theory.*

> The Rules of Civil Procedure do not require a pleader to predicate his claim for relief on a particular legal theory. The Rules require only a short and plain statement of the claim showing that the pleader is entitled to relief. No direct declaration of any principle of law is needed to warrant recovery.

74 Ohio Jur. 3d *Pleadings* § 40 (1987) (footnote omitted).

> [A] pleading must contain either direct allegations on every material point necessary to sustain a recovery on <u>any</u> legal theory, <u>even though it may not be the theory suggested or intended by the pleader</u>, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.

Id. § 74 (emphasis added, footnote omitted).

These principles were recently reaffirmed by the Ohio Supreme Court in *Illinois Controls v. Langham*, 639 N.E.2d 771 (Ohio 1994)

> Civil rule 8(A) requires <u>only</u> that a pleading contain a short and plain statement of the <u>circumstances entitling the party to relief</u>. A party is <u>not</u> required to plead the <u>legal theory of recovery</u>...

Id. at Syllabus ¶ 6 (emphasis added).

> "The rules make clear that a pleader is <u>not</u> bound by any particular theory of a claim but that the <u>facts</u> of the

claim as developed by the proof establish the right to relief."

Accordingly, it was sufficient that [the plaintiffs] set forth *facts* which, if proven, establish their claim for relief. It was not incumbent upon them to plead the law ...

Id. at 782 (citing J.W. McCormac, Ohio Civil Rules Practice § 5.02 (2d ed. 1992)) (emphasis added). Similarly, in *Westbrook v. Prudential Ins. Co.*, 524 N.E.2d 485, 487 (Ohio 1988) (*per curiam*), the court indicated that while references in a complaint to specific statutes may be "instructive," such references are not binding on the pleader since "pursuant to Civil Rule 8(A), a plaintiff need not allege the legal basis for his action." The Petitioner, "in justified reliance"[18] on these precedents, therefore believed his complaint was sufficient for him to pursue his First Amendment theory.

The ground on which the court of appeals based its ruling has not only been rejected by the Ohio Supreme Court but by at least eleven of twelve regional federal circuit courts of appeals, the sole exception being the just recently created Eleventh Circuit.

First Circuit:

> The "theory of the pleadings" doctrine, under which a complaint must proceed upon some definite legal theory and plaintiff must succeed on that theory or not succeed at all, has been all but abolished under the federal rules. Thus, under Fed. R. Civ. P. 8, it is not necessary that a legal theory be pleaded in the complaint if plaintiff sets forth "sufficient factual allegations to state a claim showing that he is entitled to relief" under some viable legal theory.

Fitzgerald v. Codex Corp., 882 F.2d 586, 589 (1st Cir. 1989) (citing 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil 2d § 1219) (where complaint based on state law claims was dismissed on ground plaintiff's state law claims were preempted by federal law and plaintiff had not pled claims on theory based on federal law, dismissal reversed because plaintiff alleged sufficient facts to warrant recovery under legal theory based on federal law); *Connecticut Gen. Life Ins. Co. v. Universal Ins. Co.*, 838 F.2d 612, 622 (1st Cir. 1988) (rejecting defense that

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[18] *NAACP v. Alabama, ex rel. Patterson, supra* at 457.

judgment should be reversed on ground that legal theory on which plaintiff prevailed had not been properly pleaded).

Second Circuit:

> [Defendant's] brief on appeal argues that the district court tried the case on a quantum meruit basis although quantum meruit was not mentioned in the complaint. But he misconceives the nature of federal pleading which is by statement of the claim, not by legal theories. Fed. R. Civ. P. 8(a); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1219; *Gins v. Mauser Plumbing Supply Co.*, 148 F.2d 974, 976 (2d Cir. 1945) (Clark, J.) ("particular legal theories of counsel yield to the court's duty to grant the relief to which the prevailing party is entitled, whether demanded or not").

Newman v. Silver, 713 F.2d 14, 15 n.1 (2d Cir. 1983). *See also Joint Counsel Dining Car Employers' Local 370 v. Delaware, L. & W. R. Co.*, 157 F.2d 417, 420 (2d Cir. 1946) ("The underlying facts ... were set forth in the complaint; and these facts, rather than some erroneous theory of law or legal conclusion, even though asserted by plaintiffs themselves, must control the disposition of this action.")

Third Circuit:

Sola v. Lafayette College, 804 F.2d 40, 45 (3d Cir. 1986) (where complaint brought action based on gender discrimination and plaintiff in her Memorandum in Opposition to Summary Judgment raised new legal theory that she was entitled to preferential treatment as a woman because, under the terms of his contract, university was required to follow affirmative action principles, trial court should have construed new allegations contained in the Memorandum in Opposition to Summary Judgment as a motion for leave to amend the complaint and should have considered affirmative action theory on its merits).

Fourth Circuit:

> Under the Federal Rules of Civil Procedure ... a plaintiff in his complaint is required only to set forth "a short and plain statement of the claim." He need not set forth any theory or demand any particular relief for the court will

> award appropriate relief if the plaintiff is entitled to it upon any theory. Under this liberalized practice, a party's misconception of the legal theory of his case does not work a forfeiture of his rights.
>
> ... [A] party ought not and does not lose his right when his counsel, however formally, advances an erroneous legal theory.

New Amsterdam Casualty Co. v. Waller, 323 F.2d 20, 24-25 (4th Cir. 1963) (footnotes omitted, emphasis added).

Fifth Circuit:

> [T]he District Court [erred in] overlook[ing] our liberal rule of federal practice under which the complaint is not to be dismissed because plaintiff's lawyer has misconceived the proper legal theory of the claim ...

Dotschay v. National Mut. Ins. Co., 246 F.2d 221, 223 (5th Cir 1957) (reversing dismissal of complaint where plaintiff entitled to relief under different theory than raised in complaint); *Thompson v. Allstate Ins. Co.*, 476 F.2d 746, 749 (5th Cir. 1973) (rejecting defense that complaint failed to state a claim because it was based on an untenable legal theory; "The plaintiff merely suggested one legal theory on which he could prevail. A complaint is sufficient if the plaintiff is entitled to relief under any legal theory." (emphasis added)); *Sherman v. Hallbauer*, 455 F.2d 1236 (5th Cir. 1972).

Sixth Circuit:

> The "theory of the pleadings" doctrine, under which a plaintiff must succeed on those theories pleaded or not at all, has been effectively abolished under the federal rules. ... As stated in C. Wright & A. Miller, *supra*, "the federal rules, and the decisions construing them, evince a belief that when a party has a valid claim, he should recover on it regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage"...

Colonial Refrigerated Transp. Inc. v. Worsham, 705 F.2d 821, 825 (6th Cir. 1983) (rejecting defense that district court erred in granting summary judgment based on legal theory not pled).

Seventh Circuit:

> The district judge believed that until Bartholet amended his pleadings to invoke ERISA, all he had was a claim arising under state common law, and as state law is preempted the complaint failed. The assumption implicit in this approach is that a complaint must plead law as well as fact. Why? Rule 8(a) of the Federal Rules of Civil Procedure says that a complaint must identify the basis of jurisdiction and contain "a short and plain statement of the claim showing that the pleader is entitled to relief." ... Complaints should be short and simple, giving the adversary notice while leaving the rest to further documents. "The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Fed. R. Civ. P. 84. None of the forms in the appendix spells out a legal theory.
>
> ... A complaint under Rule 8 limns the claim; details of both fact and law come later, in other documents. Instead of asking whether the complaint points to the appropriate statute, a court should ask whether relief is possible under any set of facts that could be established consistent with the allegations. ... [T]he complaint need not identify a legal theory, and specifying an incorrect theory is not fatal.

Bartholet v. Reishauer A.G., 953 F.2d 1073, 1077-8 (7th Cir. 1992) (emphasis added, citations omitted); *Janke Constr. Co. v. Vulcan Materials Co.*, 527 F.2d 772, 776-7 (7th Cir. 1976)

Eighth Circuit:

> [A] complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory.

Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974) (citing Wright & Miller, *supra*, § 1219).

> The "theory of the pleadings" doctrine, under which a plaintiff must succeed on those theories pleaded or not at all, has been effectively abolished under the federal rules. ... "[T]he federal rules, and the decisions construing them, evince a belief that when a party has a valid claim, he should

recover on it regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage..."

Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 714 (8th Cir. 1979) (rejecting defense that legal theory advanced was not before the courts because not pled by plaintiffs).

Ninth Circuit:

A "complaint is not to dismissed because the plaintiff's lawyer has misconceived the proper legal theory of the claim..."

U.S. v. Howell, 318 F.2d 162, 166 (9th Cir. 1963) (where complaint was brought seeking recovery based on federal statute and complaint was dismissed because complaint failed to state a claim for recovery under the statute, dismissal reversed because complaint alleged facts which stated a claim under common law contract theory).

Tenth Circuit:

We are cognizant that Keller did not denote his claim as one of "slander of title." ... [However,] [t]he dimensions of a suit are not determined by the pleadings, and it is not necessary to allege the particular law or theory under which recovery is sought.

Misco Leasing Inc. v. Keller, 490 F.2d 545, 548 (10th Cir. 1974) (citations omitted).

Circuit for the District of Columbia:

The liberal concepts of notice pleading embodied in the Federal Rules do not require the pleading of legal theories.

Hanson v. Hoffman, 628 F.2d 42, 53 (D.C. Cir. 1980) (dismissal of complaint reversed based on legal theory not raised in plaintiff's pleadings).

Unless a defendant is prejudiced on the merits by a change in legal theory, a plaintiff is not bound by the legal theory on which he or she originally relied.

Id. at 53 n.11.

See generally Wright & Miller, *supra*, § 1219.

Sherman v. Hallbauer, supra, is a striking example of how far the courts will go to see that cases are heard on their merits under modern pleading rules. Recovery in that case turned on whether the plaintiff had hired the defendant to survey a ship

plaintiff bought. Plaintiff pled and maintained throughout pretrial proceedings that a third party had hired the defendant. However, in response to a motion for summary judgment filed just before the scheduled trial date, plaintiff suddenly shifted his legal theory to claim that he had in fact hired the plaintiff and submitted evidence in support of his contention. The trial court granted summary judgment without considering the plaintiff's new legal theory, but the court of appeals reversed. Even though the plaintiff's complaint contained allegations that seem inconsistent with plaintiff's new-found theory of his case, *supra* at 1238 n.2, the court of appeals held that the trial court should have considered the new allegations in the plaintiff's memorandum as a motion for leave to amend the pleadings, and should have considered the merits of the new allegations.

None of this is to say that a plaintiff need not ever provide the court with any valid legal theory for his case. If the sufficiency of the pleadings are challenged in a motion to dismiss or for summary judgment, the plaintiff must, of course, present in his opposing memoranda some viable legal theory on which he might recover. The question is when must the legal theory be presented. The decisions of the Ohio Supreme Court and the federal courts all indicate that the plaintiff's legal theory need not be alleged in his complaint, and if a legal theory is alleged, the plaintiff is not required to rely only on that theory when faced with a challenge to his pleadings.

B. The Complaint did allege facts which, when proven, make a *prima facia* case that Petitioner's First Amendment rights were violated.

The Petitioner alleged in his Complaint facts which, when proven, make a *prima facia* case that his First Amendment rights were violated. Obviously, the First Amendment is applicable to speech made during meetings of state legislative and executive bodies. *City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976). Since, under *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), "[c]ontent-based regulations are presumptively invalid," it is sufficient merely to demonstrate the existence of a content-based restriction and that plaintiff has personally experienced an abridgment of his rights to speak as a result in order to make a

prima facia First Amendment case. Accordingly, in order for a pleading to state a First Amendment claim, it must be sufficient simply to allege facts that, when proven, would demonstrate the existence of a content-based restriction and that plaintiff's speech has been abridged as a result of the restriction. Petitioner alleged all the necessary elements in his Complaint. Complaint ¶ 8(f) plainly alleges the existence of a content-based speech restriction. Namely, it alleges that Gee, acting as presiding officer of a state governmental body, the Senate, made a subject-matter restriction excluding from Senate debate the subject of the Code change's constitutionality.

> Gee ... while acting as presiding officer of the Senate in the meeting held on April 9, 1994 ... contrary to [the Senate's rules of order] ... ruled that any debate on the legality under the U.S. Constitution of the resolution [being considered] was out of order.

Moreover, the Complaint alleges that Petitioner was a member of the Senate (Complaint ¶ 7) and it is clear from the objection the Petitioner alleged he made to Gee's ruling (Complaint ¶ 8(g)) that the Petitioner was present at the meeting and that he personally experienced an abridgment of his right to speak as a result of the ruling.

Once the existence of a content-based restriction on speech has been demonstrated, the burden of proof shifts to the government to demonstrate the existence of circumstances which would overcome the presumption against the restriction's validity. Content-based restrictions on political speech must survive "the most exacting scrutiny," *Widmar v. Vincent*, 454 U.S. 263, 276 (1981), must be "necessary to serve a compelling government interest and [] narrowly drawn to achieve that end," *id.* at 270. Clearly the Complaint's allegations are sufficient to require from the Respondents an explanation of what governmental interest, if any, was served by excluding from Senate debate discussion regarding the constitutionality of the Code change being considered, a subject not only relevant to the merits of the Code change, but at the heart of the arguments of those who opposed the Code change; while allowing discussion of any other relevant subject. Undoubtedly, given the special needs of a legislative body, the First Amendment allows a broad range of content-neural, as well as certain content-based,

regulations, such as restrictions confining debate to subject matter relevant to whatever proposal the body is considering. *Madison Joint Sch. Dist.* at 175 n.8. However, the First Amendment does not allow legislative bodies to make restrictions such as those made by Gee's ruling, namely, restrictions allowing debate on any relevant topic except some disfavored topic, such as labor grievances (*Princeton Educ. Ass'n v. Princeton Bd. of Ed.*, 480 F. Supp. 962 (S.D. Ohio 1979)) or the impugning of legislators' motives (*Kucinich v. Forbes*, 432 F. Supp. 1101 (N.D. Ohio 1977)).

> The Supreme Court [in *Madison J. Sch. Dist.* at 175 n.8] stated that "public bodies may confine their meetings to specified subject matter." We reiterate that we do not believe that the rationale for this statement justifies opening public discussion to any and all matters *except* the disfavored topic.

Princeton Educ. Ass'n at 971 n.13.[19]

More importantly, the Petitioner alleged not only content-based censorship but actual viewpoint censorship.

> Gee ... used his power as chair in a blatantly illegal manner to actively suppress debate which tended to oppose *his* expressed position on [the Code change]. ... Gee ... used the power of the chair to suppress debate which opposed *his* position on whether [the Code change] is consistent with the U.S. Constitution.

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[19]What this Court undoubtedly meant in footnote 8 of *Madison J. Sch. Dist.* was merely that, applying usual First Amendment principles, most subject matter restrictions within the legislative debate context will survive first amendment scrutiny, and not, contrary to what the Respondents have argued below, that subject matter restrictions on speech during legislative debates are entitled to a blanket First Amendment exemption. Those courts that have examined the issue have uniformly held that normal First Amendment principles are applicable to speech at meetings of state and legislative bodies. *Musso v. Hourigan*; *Hanson v. Bennett*; *Collinson v. Gott*, 895 F.2d 994, 1000 (4th Cir. 1990) (Phillips, J., plur. op.) ("Speech at public meetings ... is entitled to normal first amendment protections against ... ad hoc parliamentary rulings by presiding officials." (emphasis added) (citing *Madison J. Sch. Dist.*); *Kucinich v. Forbes*; *Princeton Educ. Ass'n*; *Wrzeski v. City of Madison*, 558 F. Supp. 664 (W.D. Wisc. 1983) (rejecting argument that rule of procedure of state legislative body deserves "special deference" when evaluating its constitutionality; "Courts have repeatedly analyzed freedom of speech cases in the legislative context without the use of any special First Amendment standard.").

Complaint ¶ 9(c) (emphasis added). The Petitioner alleged that these actions were part of a larger scheme designed to thwart "those who opposed [Gee's] position," Complaint ¶ 9(b), and thereby to influence "the outcome of votes taken in the Senate," Complaint ¶ 9. In the context in which it was done, Gee's ruling was viewpoint censorship. Gee's political opponents based their opposition to the Code change almost entirely on its unconstitutionality. Gee stopped his political opponents from expressing why they opposed the Code change by taking away from Senate debate the one topic on which they based their opposition, hence allowing Gee and his supporters to focus senate debate on issues favorable to the Code change. Compare this with *Musso v. Hourigan,* 836 F.2d 736 (2d Cir. 1988) and *Hanson v. Bennett,* 948 F.2d 397 (7th Cir. 1991), *cert. den.*, 504 U.S. 910 (1992) in which both courts held that if the purpose of the parliamentary rulings of a public body's presiding officer was to prevent the plaintiffs from expressing their views, such actions unequivocally violated the First Amendment.

Not only that, but the Petitioner alleged that Gee did not allow debate on an amendment to the Code change made by the Petitioner, even though amendments made by other authors under similar circumstances would have been afforded full Senate debate under the Senate's usual, established practices.

> Gee ... did not allow debate on an amendment to [proposed Code change] lawfully made by Mr. Lucas notwithstanding a point or order previously made to the contrary and despite the fact that the motion to amend was a debatable motion ...

Complaint ¶ 8(h).

The Complaint alleges more than enough facts to make a *prima facia* First Amendment case. The only thing missing is an explicit statement that the Petitioner bases his claims on the First Amendment. Therefore, the court of appeals ruling conflicts with the decisions of the federal courts of appeals and Ohio Supreme Court.

II. The court of appeals ruling is contrary to this Court's ruling in *Conley v. Gibson*.

Under *Conley v. Gibson*[20], 355 U.S. 41, 45 (1957),

> a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Given the allegations of the Complaint, it is far from beyond doubt that the Petitioner would be unable to prove any set of facts in support of his First Amendment claims that would entitle him to relief.

Conley v. Gibson further states

> [Modern pleading] [r]ules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

In the case at hand, the court of appeals sanctioned the dismissal with prejudice of valid First Amendment claims, not because the Petitioner failed to allege facts which, when proven, would demonstrate that his constitutional rights had been violated and not because the Petitioner failed to provide the trial court with some viable legal theory on which he based his claims, but merely because the Petitioner (a non-lawyer) put his legal theory for his claims in his memoranda opposing dismissal as opposed to the Complaint. Even if this were somehow a procedural error, dismissal with prejudice of valid First Amendment claims on the basis of such a trivial procedural faux pas clearly runs afoul of this Court's mandate that cases ought to be decided on their merits and not because of some trivial pleading misstep by counsel.[21, 22]

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[20]This standard was adopted by the Ohio Supreme Court in *O'Brien v. University Community Tenants Union*, 327 N.E.2d 753 (Ohio 1975).

[21]The Complaint's dismissal was done in the summary judgment context. However, since neither the trial court nor court of appeals made any findings of facts or law on the merits of the First Amendment claims and the court of appeals apparently held that the Complaint lacks the bare allegations necessary to warrant consideration of the merits of the First Amendment claims, Civil Rule 12(B)(6) standards regarding the minimal allegations necessary to state a claim are applicable to the First Amendment claims' dismissal. The dismissal was inappropriate under summary judgment standards as well. The allegations of the Complaint relevant to the First Amendment claims were supported by various affidavits, Lucas 3d Aff. ¶ 1, and the tapes of the Senate meeting (Lucas 2d Aff. ¶ 1 & 4th Aff. ¶ 1). As sole evidence on the

merits of these claims, the Respondents submitted an affidavit by one of the Respondents stating his belief that Gee's actions were "appropriate" under Robert's Rules of Order and citing various provisions of Robert's Rules of Order obviously not relevant to the Petitioner's claim that it was unconstitutional for Gee not to allow debate on a particular subject of debate relevant to the proposal being considered. Plainly, Robert's Rules §§ 38 and 42 do not allow a presiding officer to exclude at his pleasure any topic of debate relevant to the pending proposal and even if it did, it would be superseded by the First Amendment. The Respondents' affidavit was contradicted by just as credible testimony by the Petitioner. Lucas 3d Aff. ¶ 1; Lucas 4th Aff. ¶ 1. The Respondents therefore failed to show that "there is no genuine issue as to any material fact" or that they are "entitled to judgment as a matter of law" with regard to the merits of the First Amendment claims. Ohio R. Civ. P. 56(C).

[22] Respondents' argument that the injunctive and declaratory relief sought was "not even remotely connected" to the First Amendment claims is completely meritless. The Petitioner's first amendment claims were joined with various state law claims that Gee violated numerous provisions of the Senate's operating rules. An injunction requiring Gee to conduct future Senate meetings according to those rules was therefore perfectly appropriate. Moreover, requiring Gee to conduct senate meetings according to the senate's reasonable, and largely content-neutral, rules of debate would have ensured that First Amendment violations of the type complained of would not occur in the future. Moreover, from the standpoint of drafting an injunction, requiring Gee to comply with specific, detailed guidelines for Senate debate is far more preferable than vaguely requiring Gee not to violate the first amendment in the future. *Cf.* Ohio R. Civ. P. 65(D) ("Every ... injunction ... shall be specific in terms [and] shall describe in reasonable detail ... the act or acts sought to be restrained..." (emphasis added)).

The prayer for a declaration voiding the Senate's enactment of the Code change was also perfectly appropriate to the First Amendment claims. Legislative enactments can be declared void for violations of other types of constitutionally-mandated procedural requirements, so why not declare them void for violations of First Amendment requirements too?

Even if there were an inconsistency between the First Amendment claims and the prayer for relief, such inconsistency would not be of any relevance in determining whether the Complaint states a claim.

> The sufficiency of a pleading is tested by the statement of the claim and the demand for judgment is not considered part of the claim. Thus, selection of an improper remedy in the demand will not be fatal to a party's pleading if the statement of the claim indicates the pleader may be entitled to relief of some other type.

Wright & Miller, *supra*, § 1255 (footnotes omitted).

> [I]t would seem that the demand for judgment would have no effect upon the statement of claim or the sufficiency or insufficiency of that part of the pleading. ... The prayer [is] no part of the [statement of the] cause of action. ... [A] change in the prayer of a petition ... [cannot] remedy [a pleading] held not to be good.

74 Ohio Jur. 3d *Pleading* § 119 (1987). *See, e.g., U.S. v. Howell*, 318 F.2d 162, 166 (9th Cir. 1963) (A pleading is sufficient " 'if it shows that the

III. The court of appeals ruling is contrary to this Court's rulings in *Haines v. Kerner, Estelle v. Gamble*, and other cases: Even it the Complaint were technically deficient, he would be entitled to have it liberally construed as a non-lawyer's *pro se* complaint.

The dismissal of this case on the ground that the Petitioner put his legal theory for his claims in his memoranda opposing dismissal as opposed to his complaint is even more egregious in light of this Court's rulings in *Haines v. Kerner*, 404 U.S. 519 (1972) (*per curiam*), and *Estelle v. Gamble*, 429 U.S. 97 (1976). Even if the Petitioner's complaint were technically deficient in some respect, the Petitioner would be entitled to some leeway in his pleadings, because they were drafted without the help of an attorney. As this Court has consistently held

> [A] *pro se* complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim if it appears " 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' "

Estelle v. Gamble at 106 (emphasis added) (citing the unanimous decision in *Haines v. Kerner*). *Accord Boag v. MacDougall*, 454 U.S. 364 (1982) (*per curiam*); *Hughes v. Rowe*, 449 U.S. 5 (1980) (*per curiam*).

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plaintiff is entitled to any relief which the court can grant, regardless of whether it asks for the proper relief.' " (quoting and following *Dotschay v. National Mut. Ins. Co.*, 246 F.2d 221, 223 (5th Cir. 1957)); *Kansas City, St. L. & C. R. Co. v. Alton R. Co.*, 124 F.2d 780, 783 (7th Cir. 1941) (dismissal of complaint on ground it sought wrong remedy reversed); *Schoonover v. Schoonover*, 172 F.2d 526, 530 (10th Cir. 1949) ("the prayer forms no part of the [statement of the] cause of action"); *Ring v. Spina*, 148 F.2d 647, 653 (2d Cir. 1945) ("prayers are not binding" at the early pleading stage), *cert. den.*, 335 U.S. 813 (1948); *Coffinberry v. Sun Oil Co.*, 67 N.E. 1069, 1071 (Ohio 1903) (The pleading code " 'simply required a statement of the facts on which [the plaintiff] conceived himself entitled to [] recovery ... [to] state[] a cause of action. A prayer for relief is no part of a cause of action.' " (citing *Tiffin Glass Co. v. Stoehr*, 43 N.E. 279, 280 (Ohio 1896)); *Roller v. Patrick*, 62 N.E.2d 367, 371 (Ohio 1945) ("In determining the sufficiency of a petition ... the prayer is not controlling."); *Porter v. Norris*, 285 N.E.2d 14, 18 (Ohio 1972) (Corrigan, J., dissenting) ("[T]he long established case law in Ohio has been that the prayer of a pleading is not a part of the cause of action."); *Washington v. Washington*, 623 F.2d 1169, 1171 (6th Cir. 1980).

IV. A ruling by this Court on this case could have significant national precedential value.

A. Whether state courts are required to follow this Court's standards regarding the sufficiency of a non-lawyer's *pro se* complaint when hearing claims involving federal rights is a subject of some dispute which should be resolved by this Court.

1. Some state appellate courts have held that, notwithstanding this Court's precedents for the federal courts to the contrary, *pro se* litigants are to be treated no differently than litigants represented by counsel regarding pleading matters, when those state courts hear cases involving claims of deprivations of federal rights.

Many state courts have either voluntarily applied *Haines v. Kerner* when hearing cases involving federal rights or have analogous doctrines applicable to all claims. However, a few state appellate courts have not applied the principles of *Haines v. Kerner* when hearing cases involving federal rights.

In *Wilhoite v. Melvin Simon & Assocs.*, 640 N.E.2d 382, 384 (Ind. Ct. App. 1994), the court specifically held that federal standards regarding *pro se* pleaders were not applicable to state courts hearing federal claims and that *pro se* pleaders were not entitled to any leniency.

> Wilhoite suggests that as a *pro se* complainant, he should be held to a more lenient standard. He cites federal case law to support his contention. However, our Supreme Court has held that a *pro se* litigant must adhere to the same procedural rules as a litigant represented by counsel.

Similarly, in *Kohn v. City of Miami Beach*, 611 So. 2d 538 (Fl. Ct. App. 1992), in a federal civil rights case, the court held that in determining whether to grant leave to amend the complaint, a *pro se* pleader whose faces dismissal unless he amends his complaint should not be held to "a lesser standard than a reasonably competent attorney." Furthermore, judging from the dissent, it seems far from clear that if the pleader had been allowed to proceed that "the pleader could prove no set of facts entitling him to relief." *Estelle v. Gamble, supra.*

It is likely that there are many more examples like these since a large percentage of jurisdictions broadly hold that *pro se* litigants should not be held to standards any more lenient than

those for lawyers.[23] Furthermore, for every case like the two above, there are countless more like the instant case where, although the lower court does not specifically disavow the applicability of this Court's precedents regarding *pro se* complaints, an examination of the facts of the case reveals that the court clearly did not give the pleader the liberal treatment he was entitled to.[24]

2. This Court should hold that its precedents in *Haines v. Kerner* and similar cases are applicable to state courts evaluating the sufficiency of a *pro se* complaint for the purposes of raising federal claims.

This Court has made unambiguously clear that federal courts must not dismiss *pro se* complaints for mere lack of technical sophistication on the part of *pro se* pleaders. This Court has also indicated that, although state courts have great latitude in applying their procedural requirements to cases involving federal claims, they may not use pleading rules so burdensome that many cases will be dismissed with prejudice because of over-meticulous state pleading rules.

> Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. "Whatever springs the State may set for those endeavoring to assert rights that the state confers, the assertion of federal rights, when plainly and reasonably

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[23]*See, e.g., Makin v. Liddle*, 639 P.2d 3, 4 (Idaho 1981) (*pro se* litigants to be "held to the same standards, procedures, and rules as would be any attorney"); *Dorgan v. Mercil*, 269 N.W.2d 99, 100 (N.D. 1978) ("We do not believe any rule ... should be modified, altered, or applied differently merely because a party" is acting *pro se.*); *Federal Land Bank v. Overboe*, 426 N.W.2d 1, 2 (N.D. 1988); *Johnson v. Aetna Cas. & Surety Co.*, 630 P.2d 514, 517 (Wyo. 1981), (*pro se* litigants "must be held to the same standard as" lawyers), *app. dismiss. f. want juris. & cert. den.*, 454 U.S. 1118 (1981); *Homecraft Corp. v. Fimbres*, 580 P.2d 760, 762 (Ariz. 1978); *Sunpower Inc. v. Hawley*, 296 N.W.2d 532, 533 (S.D. 1980); *Cain v. Webster*, 770 S.W.2d 327, 328 (Mo. App. 1989) (*pro se* litigant is " 'entitled to no indulgence [he] wouldn't have received if represented by counsel' "); *Harding v. Collazo*, 223 Cal.Rptr. 329, 335 (App. 1986) (*pro se* litigant not "entitled to a more indulgent application of the rules" of procedure).

[24]Recall that in *Haines v. Kerner*, *Boag v. MacDougall*, and *Hughes v. Rowe*, the lower courts of appeals never explicitly stated that the *pro se* pleader was not entitled to leeway, but it was only after an examination of the facts in those cases that this Court concluded that the pleaders had not been afforded the leeway they were entitled.

made, is not to be defeated under the name of local practice." Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved.

Brown v. Western Ry. of Alabama, supra at 298-299 (citations omitted) (holding that Alabama courts could not use their practice of construing pleadings "most strongly against the pleader" when hearing claims involving federal rights). In holding that a state's notice-of-claim procedure cannot be applied by state courts to federal claims, this Court in *Felder v. Casey*, 487 U.S. 131, 150 (1988), announced a broader principle that state procedural requirements cannot be applied to cases involving federal rights if that state procedural requirement is so burdensome that "the outcome of federal civil rights litigation will frequently and predictably depend on whether it is brought in state or federal court."

This Court should take this case and hold that *Haines v. Kerner* and similar cases are applicable to state courts evaluating the sufficiency of a *pro se* complaint to raise federal claims. Unless this Court resolves this issue, countless more meritorious federal civil rights cases will be dismissed without ever having a hearing on their merits, for no other reason than that the plaintiff was too poor to hire an attorney and the plaintiff filed his case in a state court.

3. This Court should hold that a state trial court may not refuse to consider a *pro se* pleader's legal theory that he has been deprived of federal rights because the pleader did not plead the legal theory in his complaint, when the complaint pleads sufficient operative facts to support the legal theory raised, unless the legal theory is raised in such a late stage in the litigation that the defending party is substantially prejudiced by the change in legal theory.

Perhaps nowhere does a *pro se* pleader need leeway from the trial court than in fitting the proper legal theory to the facts which he intuitively knows violated his rights. All the reasons that the federal courts have held that it is unsound to hold that pleaders must succeed on the legal theory pled or not at all are amplified a thousand-fold when applied to the *pro se* pleader.

B. Given that the federal courts have unequivocally rejected the "theory of the pleadings" doctrine in which a pleader must succeed on the legal theory in the pleadings or not at all, this Court may wish to consider in general whether it is appropriate for state courts to apply this doctrine to pleadings involving federal rights.

Cf. Brown v. Western Ry. of Alabama, supra. While the "theory of the pleadings" doctrine is not entirely without any rational purpose, its dubious, minimal benefits are far outweighed by its negative impact in preventing meritorious claims from being heard.

C. This Court should take this case to clarify what are the minimum allegations that a complaint must contain to state a claim under the First Amendment.

Given the special place the First Amendment has at the heart of our democracy, our courts should be especially receptive to First Amendment claims. It should not be that difficult to plead a First Amendment claim. In the case of a challenge to a content-based speech restriction, all that should need to be alleged are facts showing that the government has imposed a content-based speech restriction and that plaintiff has experienced an abridgment of his right to speak as a result. This is a direct consequence of the "presumptive invalid[ity]" of content-based speech restrictions,[25] but it is a consequence that is easily overlooked. For this reason, a ruling by this Court on this case explicitly stating that the above allegations are all that is necessary to challenge a content-based speech restriction would be a particularly useful precedent. Such a precedent would be useful as well in demonstrating in general how simple it should be to plead a First Amendment claim under modern notice pleading -- a point that was obviously lost on the Franklin County Court of Appeals.

V. Trustees' reenactment of Code change enacted by the Senate did not render moot the case for injunctive relief.

Petitioner's Complaint prays in part for injunctive relief which would prevent Gee from violating First Amendment rights in the future by requiring him to comply with the Senate's rules of debate and procedure. The resolution the Board of Trustees

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[25]*See* Section I(B), *infra.*

adopted on June 3, 1994 that reenacted the Code change enacted by Senate is contained in the Appendix p. 56a. Clearly, nothing the Trustees did in readopting the Code change the Senate enacted does anything to deter Gee from violating First Amendment rights in future Senate meetings in the same manner described in the Complaint. Therefore, the case for *injunctive* relief is not moot. *U.S. v. W.T. Grant, supra* at 632 (case seeking injunctive relief not moot if "the defendant is free to return to his old ways.")

VI. While claiming that "[first amendment] claims were [not] advanced" in the trial court, the court of appeals, like the trial court, found that it lacked subject matter jurisdiction over the claims that it perceived had been raised in the trial court.[26] Under Ohio R. Civ. P. 41(B)(4), a dismissal for lack of subject matter jurisdiction cannot be a dismissal "on the merits." Therefore, the court erred in upholding the dismissal of the complaint "with prejudice." By upholding the dismissal on the merits of claims the merits of which it determined the trial court had no jurisdiction to consider, the court of appeals deprived Petitioner of the due process of the law.[27] In particular, unless vacated or reversed, the ruling may deprive him of access to the courts to hear the constitutional claims the court of appeals claimed he did not raise in the trial court.

Conclusion

Certiorari should be granted. This case is appropriate for summary reversal.

Respectfully submitted,
VINCENT A. LUCAS
Petitioner, pro se

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[26] "[T]he trial court correctly concluded that ... the court was without subject matter jurisdiction to consider the merits of plaintiff's case." Decision at 6-7 (App. 6a); Trial Court decision at 4 (App. 21a).

[27] *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (due process requires a judicial tribunal to have subject matter jurisdiction before it can enter judgment on the merits of claims). Although the with/without prejudice issue was not raised below, Petitioner asks the court to consider this issue under its plain error doctrine. *See, e.g., Wood v. Georgia*, 450 U.S. 261, 264-5 n.5 (1981). The failure to raise this issue below is not an "adequate and independent state ground" barring review, since under Ohio law, lack of subject matter jurisdiction may be raised at any stage of appellate review. 4 Ohio Jur. 3d *Appellate Review* § 141.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Vincent Lucas,	:	
Plaintiff-Appellant,	:	
	:	No. 94APE09-1343
v.	:	
	:	(REGULAR CALENDAR)
E. Gordon Gee et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 1, 1995

Vincent Lucas, pro se.

Betty D. Montgomery, Attorney General, and *John C. Dowling*, for appellees The Ohio State University, E. Gordon Gee and James Nichols.

APPEAL from the Franklin County Court of Common Pleas.

DESHLER, J.

This is an appeal by plaintiff, Vincent Lucas, from a judgment of the Franklin County Court of Common Pleas in favor of defendants, following the court's conversion of defendants' motion to dismiss to a motion for summary judgment.

The underlying basis of this action arose out of an April 9, 1994 meeting of the University Senate of defendant, The Ohio State University ("OSU"). During that meeting, the University Senate voted 69-10 to include OSU's existing

sexual harassment policy as an express provision in OSU's Code of Student Conduct.

On May 4, 1994, plaintiff filed a complaint on behalf of himself, the members of the University Senate, the faculty and staff of OSU and "all others similarly situated," against defendants, OSU, E. Gordon Gee and James Nichols. The complaint alleged that plaintiff was a graduate student at OSU and a voting member of the University Senate, and that defendant Gee, the president of OSU, was the presiding officer of the University Senate at a meeting on April 9, 1994. It was alleged that Gee, while presiding at the meeting, "blatantly disregarded the Bylaws of the University Senate" and acted in violation of various provisions of "Robert's Rules of Order."

On May 18, 1994, plaintiff filed a motion for class action determination. Defendants filed a memorandum in opposition to plaintiff's motion.

On June 7, 1994, defendants filed a motion to dismiss plaintiff's complaint, alleging that the complaint failed to state a claim for relief and that Lucas, a non-lawyer, was engaged in the unauthorized practice of law by the commencement and prosecution of a class action. On June 21, 1994, plaintiff filed a motion for summary judgment. Plaintiff subsequently withdrew this motion and the trial court, by entry filed July 14, 1994, denied plaintiff's motion for summary judgment as moot.

By decision and entry filed July 7, 1994, the trial court denied plaintiff's motion for class determination on the basis that plaintiff, as a non-lawyer, could not maintain this action on behalf of a class. The trial court further converted defendants' motion to dismiss into a motion for summary

judgment and set the matter for a non-oral hearing on August 3, 1994. Defendants filed a supplemental memorandum on July 21, 1994. Attached to the memorandum were various affidavits.

By decision filed August 10, 1994, the trial court granted summary judgment in favor of defendants. Based upon the affidavits submitted, the trial court held in part:

> " *** The Court carefully reviewed the submitted affidavits and as a result, finds that regardless of any declaratory ruling this Court may render with reference to the alleged breach of Robert's Rules of Order, the Ohio State University Board of Trustees, in compliance with a federal mandate, adopted a university-wide sexual harassment policy on November 5, 1993. Plaintiff has not challenged the adoption of the policy on November 5, 1993.
>
> "Plaintiff has also not challenged the Board of Trustees' adoption of the sexual harassment policy on June 3, 1994. As pled, Plaintiff's sole quarrel is with the procedure by which the University Senate recommended to the Board of Trustees that the policy again be adopted. On April 9, 1994, the University Senate recommended that the Board of Trustees expressly incorporate the policy into the Code of Student Conduct, whereas the November 5, 1993 action only implicitly adopted the policy with respect to the Code of Student Conduct. This Court finds that Plaintiff has failed to satisfy the first element of the Duryee rule, i.e. that a real controversy exists between the parties. Moreover, the Court finds that no genuine issue of material fact exists with respect to plaintiff's claim for declaratory relief. The sexual harassment policy applies irrespective of whether or not this Court finds that Defendant, Gee, violated Robert's Rules of Order."

The trial court further found that plaintiff's action was moot as a result of the Board of Trustees' action of June 3, 1994, during which the sexual harassment policy was expressly incorporated into the Code of Student Conduct. The court further agreed with defendants' contention that the court lacked

jurisdiction to review or interfere with the internal procedures and proceedings of a legislative body.

On appeal, plaintiff asserts four assignments of error for review:

> "1. The trial court erred in dismissing the First and Fourteenth Amendment issues of this case.
>
> "2. Even ignoring the constitutional issues of this case, the trial court erred in holding that it lacked jurisdiction over the subject matter of this case.
>
> "3. The trial court erred in holding that the actions of the Board of Trustees of Ohio State University on June 3, 1994 rendered this case moot, especially with regards to the injunctive relief sought.
>
> "4. The trial court erred in not granting Plaintiff's motion for a continuance of the non-oral hearing set for Aug. 3, 1994 on Defendants' Motions to Dismiss, NKA Motion for Summary Judgment, where such continuance was sought because Defendants' Motion for a Protective Order, filed July 15, 1994, substantially delayed Plaintiff's discovery efforts."

Plaintiff's first assignment of error regarding a denial of First and Fourteenth Amendment rights is not reviewable on this appeal as plaintiff did not raise these questions in the trial court. The complaint of plaintiff did not allege constitutional deprivations and the trial court's decision rendering summary judgment in favor of defendants does not mention any claims of violation of constitutional rights. The trial court's decision was premised upon the conclusions that any violation of Robert's Rules of Order occurring in the University Senate would be non-justiciable and the issue was moot in view of action subsequently taken by the OSU Board of Trustees.

As stated in *Wright v. State* (1990), 69 Ohio App.3d 775, 783:

> " *** We will not guess at what the trial court was '*sub silentio weaving*' into its decision. When an issue is not

decided at the trial level, we will not address it at the appellate level, particularly in light of the maxim that a decision should be rendered on nonconstitutional grounds first, if possible."

The error claimed by plaintiff is not reviewable on appeal as such claims were neither advanced by plaintiff in the trial court nor decided by the trial court upon rendering its decision converting the motion to dismiss to one of summary judgment. Plaintiff's first assignment of error is therefore overruled.

Plaintiff's second assignment of error suggests "even ignoring the constitutional issues of this case, the trial court erred in holding that it lacked jurisdiction over the subject matter of this case." As a constant theme in plaintiff's pleadings, briefing and arguments, plaintiff contends that violation of Robert's Rules of Order by the presiding officer of the University Senate gave rise to justiciable issues relating to deprivation of constitutional rights. This contention is not supported by case law in Ohio and while other states may recognize such claims, Ohio has not enlarged the scope of constitutional protection to the extent urged by plaintiff. Many of the cases cited by plaintiff do not have direct application to the facts here as the litigation relating to legislative bodies in other states concerns popularly elected legislators, elected to the lawmaking body of a sovereign. Neither the application and use of Robert's Rules of Order in the University Senate nor the actions of the Senate itself are matters having the standing of law. Therefore, any claimed procedural violations, especially the procedural aspects of the

interpretation and application of Robert's Rules of Order, do not give rise in substance to any enforceable constitutional claims.

In Ohio, we have perhaps a more restrictive view of judicial intervention in the workings of a legislative body. As stated in *State ex rel. Smith v. Ocasek* (Jan. 10, 1975), Franklin App. No. 75AP-9, unreported (1975 Opinions 33):

> "The rules as adopted by the legislative body of the state are generally to be considered as internal affairs of such legislative body, and based upon the separation of powers of the state between executive, legislative and judicial, *are non-litigable and shall not be disturbed by the courts.*
>
> " *** Where rules are not prescribed by the Ohio Constitution such rules are enacted by the legislative body would be beyond the purview of the courts." (Emphasis *sic.*)

This principle of non-interference, as alluded to in *Ocasek, supra*, is found throughout Ohio case law and has not been altered by subsequent case development or statute. It is obvious that if the courts have great reluctance to interfere with the internal working of the state's duly elected legislative House and Senate, certainly this doctrine extends to the internal workings of a body such as the University Senate. The principle of non-intervention has further application in the case before us as it is clear from statutes and administrative code sections that the University Senate, while adopting Robert's Rules of Order as the guidelines for parliamentary procedure, permits its internal procedures to be administered at the discretion of its officers. The violation of rules by the chairman or presiding officer of the Senate does not give rise to justiciable claims of deprivation of constitutional rights. Thus, the trial court correctly concluded that to the extent plaintiff's major claim

for relief was founded upon alleged violations of Robert's Rules of Order by the presiding officer of the University Senate, the court was without subject matter jurisdiction to consider the merits of plaintiff's case. Accordingly, plaintiff's second assignment of error is overruled.

In his third assignment of error, plaintiff urges that the trial court erred in concluding that action by the OSU Board of Trustees on June 3, 1994, incorporating a university wide sexual harassment policy into the Code of Student Conduct, mooted the basic issue raised by plaintiff relating to earlier action in the University Senate. While it is clear that the University Senate has authority to make recommendations to OSU's Board of Trustees, such recommendations do not condition one way or the other the Board of Trustees' authority to act on all matters within its broad jurisdiction over university policies. As correctly stated by defendants, "once the Ohio State's Board unanimously adopted the Student Code sexual harassment policies, it is no longer a matter whether the Senate proceedings were in complete technical compliance with Robert's Rules of Order or not." As we have already stated, the plaintiff's challenge to the propriety of the application of Robert's Rules of Order by the presiding officer of the University Senate does not give rise to justiciable claims relating to constitutional rights. The subsequent action of the Board of Trustees does result in a valid claim of mootness since the very policy under consideration by the University Senate became OSU policy as a consequence of the action taken by the Board of Trustees. We note parenthetically that there has been no direct challenge to the validity of the action taken by the OSU Board of Trustees. Therefore, we conclude that the trial court did not err in its conclusion that

the issues raised by plaintiff were mooted by the action of the OSU Board of Trustees. Plaintiff's third assignment of error is overruled.

Plaintiff's fourth assignment of error relates to a claim of procedural error when the trial court denied plaintiff's request for a continuance of the non-oral hearing date set for August 3, 1994 on defendants' motion to dismiss which was converted to a motion for summary judgment. It appears that plaintiff sought additional time so that discovery could be completed. However, the record discloses that additional time for discovery was not justified in view of the legal questions before the trial court. The control of the docket and consideration of motions by the trial court rests within the trial court's sound discretion and in accordance with the civil rules of procedure. We find no abuse of discretion by the trial court's denial of additional time for discovery and the consequent denial of plaintiff's request for continuance. There is nothing in the factual background of this case that would provide any justification for massive discovery and endless depositions. Such accommodation by the trial court, as far as permitting additional and extensive discovery would in retrospect be an abuse of the discovery process. The issues before the trial court were founded upon a generally uncontroverted factual background obviating the necessity of protracted discovery. Thus, a resolution of the case was properly addressed by way of summary judgment. We find no abuse of discretion on the part of the trial court in denying plaintiff's request for continuance of the non-oral hearing date. Accordingly, plaintiff's fourth assignment of error is overruled.

Defendants raised in their brief as an "additional assignment of error" the issue of plaintiff's standing regarding the seeking of injunctive relief. Since this issue should have been posited by way of a cross-appeal, pursuant to App.R. 3, as amended, we will not consider this assignment of error. Our decision on other issues in this case should provide ample guidance to a trial court in the event there is continued litigation emanating from any actions occurring in the University Senate involving plaintiff.

Having overruled each of plaintiff's assignments of error, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and STRAUSBAUGH, JJ., concur.

STRAUSBAUGH, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Vincent Lucas, Plaintiff-Appellant,	:	
	:	No. 94APE09-1343
v.	:	
	:	(REGULAR CALENDAR)
E. Gordon Gee et al., Defendants-Appellees.	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on June 1, 1995, plaintiff's assignments of error are overruled, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

BRYANT, DESHLER & STRAUSBAUGH, JJ.

By /s/ Dana A. Deshler
Judge Dana A. Deshler

STRAUSBAUGH, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

cc: Vincent Lucas, *pro se*
Betty D. Montgomery, AG
John C. Dowling, AAG

[entered June 1, 1995]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Vincent Lucas,	:	
Plaintiff-Appellant,	:	
	:	No. 94APE09-1343
v.	:	
	:	(REGULAR CALENDAR)
E. Gordon Gee et al.,	:	
Defendants-Appellees.	:	

MEMORANDUM DECISION

Rendered on July 20, 1995

Vincent Lucas, pro se.

Betty D. Montgomery, Attorney General, and *John C. Dowling*, for appellees The Ohio State University, E. Gordon Gee and James Nichols.

ON MOTION FOR RECONSIDERATION

DESHLER, J.

Plaintiff, Vincent Lucas, has filed a motion for reconsideration of our decision in *Lucas v. Gee et al.* (June 1, 1995), Franklin App. No. 94APE09-1343, unreported (Memorandum Decision).

The test generally applied upon a filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court in the earlier proceedings. *Matthews v. Matthews* (1981), 5 Ohio App.3d 140.

Because appellant's motion for reconsideration raises no issue for review that was not considered at all or was not fully considered when it should have been, appellant's motion is overruled. Appellant's motion in general is viewed as an effort to visit again arguments already considered in the trial court and this court. The time and effort devoted to this case by the trial court and court of appeals far exceeds the legal significance of the various allegations of wrongdoing complained of by appellant.

Appellant has not shown entitlement to relief by way of reconsideration of our earlier decision. Accordingly, appellant's motion for reconsideration is denied.

Motion for reconsideration denied.

BRYANT and STRAUSBAUGH, JJ., concur.

STRAUSBAUGH, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Vincent Lucas,	:	
Plaintiff-Appellant,	:	
	:	No. 94APE09-1343
v.	:	
	:	(REGULAR CALENDAR)
E. Gordon Gee et al.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the memorandum decision rendered herein on July 20, 1995, it is the order of this court that the motion for reconsideration is denied.

BRYANT, DESHLER & STRAUSBAUGH, JJ.

By /s/ Dana A. Deshler
Judge Dana A. Deshler

STRAUSBAUGH, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

cc: Vincent Lucas, *pro se*
Betty D. Montgomery, AG
John C. Dowling, AAG

[entered July 20, 1995]

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

CIVIL DIVISION

VINCENT LUCAS, on behalf of himself and all others similarly situated,	:	
Plaintiffs,	:	Case No. 94CVH05-3123
vs.	:	JUDGE BESSEY
E. GORDON GEE, ET AL.	:	
Defendants.	:	

DECISION AND JUDGMENT ENTRY ON PLAINTIFFS' MOTION FOR CLASS ACTION DETERMINATION FILED MAY 18,1994; AND DEFENDANTS' MOTION TO DISMISS FILED JUNE 7,1994; AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED JUNE 21,1994.

Rendered this 6 day of July, 1994.

BESSEY, J.

This matter came to be heard on the Motion for Class Action Determination of Plaintiff, Vincent Lucas, pro se, filed May 18, 1994. Defendants filed their Memorandum in Opposition on June 2, 1994. Plaintiff filed his reply on June 9, 1994. On June 7, 1994, Defendants filed a Motion to Dismiss pursuant to Civ.R. 12(b)(6). Plaintiff responded by filing a Motion for Summary Judgment on June 21, 1994. Defendants filed their Reply on July 1, 1994.

This cause arises out of a Complaint filed May 4, 1994, in which Plaintiff Vincent Lucas, pro se, on behalf of himself and other parties, seeks a declaratory judgment, permanent injunction and compensation. Plaintiff Lucas, pro se, requests the above-mentioned relief as a result of Defendants' alleged breach of Robert's Rules of Order and Senate bylaws during a

meeting of the University Senate of the Ohio State University on April 9, 1994. As a consequence of Defendants' alleged breach of Robert's Rules of Order and Senate bylaws, the Senate adopted a sexual harassment policy as a part of the Ohio State's Code of Student Conduct.

In the Motion for Class Action Determination, Plaintiff, Lucas, pro se assays to obtain the Court's certification of a class consisting of members of the University Senate of the Ohio State University and those individuals, mainly students, who are represented by members of the Senate pursuant to Civ.R. 23.

Civ.R. 23 states:

> **(A) Prerequisites to a class action**. One or more members of a class may sue of be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> **(B) Class actions maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:
>
> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

The Court must now analyze this matter under Civ.R. 23. In Warner v. Waste Management, Inc. (1988), 36 Ohio St.3d 91, paragraph one of syllabus, the Ohio Supreme Court held that, "[a] trial judge must make seven affirmative findings before a case may be certified as a class action. Two prerequisites are implicitly required by Civ.R. 23, while five (5) other are specifically set forth therein."

Foregoing a lengthy analysis of the above-mentioned elements, the Court will note that Plaintiff, Lucas, pro se's motion fails on at least one element--Civ.R.23(A)(4). In Hurst

v. Dept. of Rehabilitation and Corrections (Jan. 21, 1993), Franklin App. No. 92AP-666, the court ruled that "a pro se litigant cannot maintain a class action since only an attorney licensed to practice law in this state can properly represent persons other than the pro se litigant himself." Therefore, even if Plaintiff, Lucas, pro se fulfills the six (6) other elements as set forth in Warner, supra., because he is a non-lawyer, Plaintiff, Lucas, pro se cannot maintain this action on behalf of a class. Although the Court has not made a formal ruling on the other six (6) Warner elements, it did consider Warner, supra.; Shaver v. Standard Oil Co. (1993), 89 Ohio App.3d 52 and Klocke v. A & D Ltd. Partnership (1993), 90 Ohio App.3d 317 in rendering this Decision.

Accordingly, Plaintiff, Lucas, pro se's Motion for Class Determination is hereby **DENIED.**

The Court hereby notifies the parties of its intention to convert Defendants' Civ.R. 12(B)(6) motion into a Motion for Summary Judgment under Civ.R. 56.

Pursuant to the Ohio Supreme Court case of Federated Dept. Stores, Inc. v. Lindley (1987), 30 Ohio St.3d 135, syllabus, this Court hereby notifies the parties that this matter is set for non-oral hearing on **August 3, 1994**. Accordingly, both parties shall submit evidence as specifically enumerated in Civ.R. 56 including, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, timely filed for consideration.

In particular, the Court requests the parties address the issue raised by Defendants that Plaintiff's action, even if successful, will have no effect on the sexual harassment policy because the Board of Trustees previously adopted the identical policy which is applicable to all Ohio State faculty, staff and students. Of course, the court will also consider any other arguments raised by the parties.

In addition, the court notes that as a result of the denial of class certification, Plaintiff is bringing this cause solely in his own name. Therefore, Plaintiff is not "engaged in the unauthorized practice of law."

SO ORDERED.

/s/ John P. Bessey
JOHN P. BESSEY, JUDGE

Copies to:

Vincent Lucas
Plaintiff, Pro Se

Steven J. McDonald
John C. Dowling
Assistant Attorneys General
Attorneys for Defendants

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

CIVIL DIVISION

VINCENT LUCAS, Plaintiff,	:	
vs.	:	Case No. 94CVH05-3123
E. GORDON GEE, ET AL. Defendants.	:	JUDGE BESSEY

DECISION ON DEFENDANTS' MOTION TO DISMISS NKA MOTION FOR SUMMARY JUDGMENT FILED JUNE 7, 1994

Rendered this 10th day of August, 1994.

BESSEY, J.

This matter came to be heard on the Motion to Dismiss of Defendants, filed June 7, 1994. On June 21, 1994, Plaintiff filed his Memorandum Contra. Defendants filed their Reply on July 11, 1994. On July 7, 1994, the Court issued a Judgment Entry which converted the above motion into a Motion for Summary Judgment in accordance with Federated Dept. Stores, Inc. v. Lindley (1987), 30 Ohio St.3d 135, syllabus. Defendants filed a Supplemental Memorandum in support of their motion on July 21, 1994. On August 3, 1994, Plaintiff filed his Supplemental Memorandum Contra. Finally, On August 3, 1994, Defendants submitted additional authorities in support of their motion.

As a preliminary matter, the Court notes that this Decision is being rendered in conformity with all applicable rules and law governing summary judgment, including Civ. R. 56.

Defendants request judgment as a matter of law in this cause on the following grounds:

--the relief requested would be in vain;

--the action is now moot;

--plaintiff no longer has standing to seek prospective relief;

--the Complaint fails to state a claim upon which relief can be granted.

--the Court lacks jurisdiction.

On May 4, 1994, Plaintiff instituted this cause seeking a declaratory judgment, permanent injunction and costs/fees. Plaintiff prays for such relief as a result of Defendants' alleged breach of Robert's Rules of Order and Senate Bylaws during a meeting of the University Senate of the Ohio State University on April 9, 1994.

The Court of Appeals, Tenth Appellate District recently set forth the general rule regarding declaratory relief. Specifically, in The Ohio Association of Life Underwriters, Inc. v. Duryee (June 16, 1994), Franklin App. No. 94APE01-24, unreported, the court provided:

> The essential elements for declaratory relief are: (1) a real controversy between the parties; (2) the controversy is justiciable in character; and (3) speedy relief is necessary to preserve the rights of the parties. [citations omitted]. A court may dismiss a declaratory judgment action under Civ. R. 12(B)(6) only where (1) there is no controversy or justiciable issue between the parties, or where (2) declaratory judgment will not terminate the uncertainty or controversy. . . . Id., see also, AEI Group, Inc. v. Ohio Dept. of Commerce (1990), 67 Ohio App.3d 546, 550; Bilyeu v. Motorists Mutual Ins. Co. (1973), 36 Ohio st.2d 35, 37.

Here, the Court could not determine, on the face of the pleadings, whether the above elements for declaratory relief were fulfilled. Thus, the Court converted Defendants' Motion to Dismiss into a Motion for Summary Judgment.

Defendants submitted affidavits in support of their motion. Plaintiff also submitted an additional affidavit. The Court carefully reviewed the submitted affidavits and as a result, finds that regardless of any declaratory ruling this Court may render with reference to the alleged

breach of Robert's Rules of Order, the Ohio State University Board of Trustees, in compliance with a federal mandate, adopted a university-wide sexual harassment policy on November 5, 1993. Plaintiff has not challenged the adoption of the policy on November 5, 1993.

Plaintiff has also not challenged the Board of Trustees' adoption of the sexual harassment policy on June 3, 1994. As pled, Plaintiff's sole quarrel is with the procedure by which the University Senate recommended to the Board of Trustees that the policy again be adopted. On April 9, 1994, the University Senate recommended that the Board of Trustees expressly incorporate the policy into the Code of Student Conduct, whereas the November 5, 1993 action only implicitly adopted the policy with respect to the Code of Student Conduct. This Court finds that Plaintiff has failed to satisfy the first element of the Duryee rule, i.e. that a real controversy exists between the parties. Moreover, the Court finds that no genuine issue of material fact exists with respect to plaintiff's claim for declaratory relief. The sexual harassment policy applies irrespective of whether or not this Court finds that Defendant, Gee, violated Robert's Rules of Order.

Further, the Court finds Defendants' argument well-taken that Plaintiff's action is now moot. Specifically, as a result of the Board of Trustee's action of June 3, 1994, the policy was expressly incorporated into the Code of Student Conduct. Plaintiff has not challenged the June 3, 1994 action of the Board of Trustees. Plaintiff asserts, however, that the Board of Trustees adopted the policy "only because it was approved by the University Senate." Nevertheless, the Board of Trustees adopted the policy in compliance with its procedures. Thus, the policy applies, which renders plaintiff's cause moot.

Defendants correctly point out that Plaintiff is no longer a member of the University Senate. As a consequence, he cannot vote in future meetings of the University Senate.

Notwithstanding that, Plaintiff can participate in such meetings; hence, plaintiff has standing to seek prospective relief in this cause. Defendants' Motion for Summary Judgment on this issue is **DENIED**.

Lastly, the Court finds Defendants' argument well-taken on the issue that this Court lacks jurisdiction to review or interfere with the internal procedures and proceedings of a legislative body. In particular, the Court determines that it lacks jurisdiction on this matter in accordance with State, ex rel. Smith v. Ocasek (Jan. 10, 1975), Franklin App. No. 75AP-9, unreported, as affirmed in State, ex rel. Smith v. Ocasek (1976), 46 Ohio St.2d 200, 201.

In summary, the Court finds that Defendants are entitled to judgment as a matter of law because:

--no real controversy exists between the parties;

--Plaintiff's cause is now moot as a result of the Board of Trustees' action on June 3, 1994; and

--this Court lacks jurisdiction pursuant to Ocasek, supra.

The Court hereby **GRANTS** Defendants' Motion to Dismiss, NKA Motion for Summary Judgment. In accordance with Loc. R. 25.01, counsel for Defendants shall submit the appropriate judgment entry to the Court.

/s/ John P. Bessey
JOHN P. BESSEY, JUDGE

Copies to:

Vincent Lucas
Plaintiff, Pro Se

Steven J. McDonald
John C. Dowling
Assistant Attorneys General
Attorneys for Defendants

IN THE COURT OF COMMON PLEAS
FOR FRANKLIN COUNTY, OHIO

VINCENT LUCAS,	:	
Plaintiff,	:	
	:	Case No. 94CVH-05-3123
v.	:	
	:	Judge Bessey
E. GORDON GEE, et al.	:	
Defendants.	:	

JUDGMENT ENTRY

This matter came on for hearing upon the Motion of Defendants The Ohio State University, E. Gordon Gee and James Nichols to Dismiss, filed on June 7, 1994. On July 6, 1994, the Court converted that motion into a motion for summary judgment, set a non-oral hearing date of August 3, 1994, and so notified the parties in accordance with Civil Rules 12(B) and 56. Upon consideration of the complaint and the briefs and evidence submitted by the parties, the Court finds the motion to be well-taken for the reasons stated in the Decision filed on August 10, 1994. Accordingly, it is ORDERED that judgment be entered in favor of the defendants and that plaintiff's complaint be dismissed in its entirety with prejudice. Costs shall be taxed to plaintiff.

Dated: _____ /s/ John P. Bessey
Judge Bessey

AGREED AS TO FORM:

/s/ Vincent Lucas
Vincent A. Lucas
3180 Smith Lab
174 W. 18th Avenue
Columbus, Ohio 43210
(614) 294-8515

Plaintiff

[entered Aug. 18, 1994]

/s/ Steven J. McDonald
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/s/ John C. Dowling/ by Steven J. McDonald
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Trial Attorneys for Defendants
The Ohio State University,
E. Gordon Gee and James Nichols

The Supreme Court of Ohio

1995 TERM

To wit:
October 18, 1995

Vincent Lucas, :
Appellant, :

Case No. 95-1439

v. :

ENTRY

E. Gordon Gee et al., :
Appellees. :

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Vincent Lucas.

(Franklin County Court of Appeals; No. 94APE091343)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

The Supreme Court of Ohio

1995 TERM

To wit:
November 22, 1995

Vincent Lucas, Appellant,	:	Case No. 95-1439
v.	:	RECONSIDERATION ENTRY
E. Gordon Gee et al., Appellees.	:	(Franklin County)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. 94APE091343)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

Plaintiffs' Memorandum Opposing Dismissal 5-8:

B. **Defendants' actions violated the First Amendment and federal law**

In not allowing debate on the constitutionality of the resolution to amend the Code of Student Conduct (Complaint @ 8(f),(g)), Gee imposed a content based restriction on speech in violation of the First Amendment of the U.S. Constitution and thus violating 42 U.S.C. 1983 as well.

In *Madison School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167, the Supreme Court first recognized that the First Amendment affords participants in open school board meetings freedom from regulations that "discriminate between speakers on the basis of their employment or the content of their speech." Id. at 176. "To permit one side of a debatable political question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." Id.

Similarly, in *Musso v. Hourigan*, 836 F2d. 736, the court refused to grant summary judgment for a defendant who acted as presiding officer of an open school board meeting on the charge that the defendant violated the plaintiff's First Amendment rights when he ruled him out of order. "*[i]f* [the presiding officer] imposed a content-based restriction, such conduct unambiguously violated clearly established first amendment law." Id. at 743 (italics in original). This principle was affirmed in *Collinson v. Gott*, 895 F2d. 994, by a majority of judges. "Speech at public meetings called by government officials for discussion of matters of public concern is entitled to normal first amendment protections against general restrictions or *ad hoc* parliamentary rulings by presiding officers." Id. at 1000 (Judge Philips agreeing that First Amendment could have been violated but granting summary judgment on the basis of qualified immunity). "There can be little doubt that Gott [, the defendant,] knew or should have known that expulsion of Collinson [, the plaintiff,] unless he was disruptive would 'violate clearly established statutory or constitutional rights.'" (Judge Butzner agreeing that First

Amendment could have been violating and dissenting on the decision to grant summary judgment on the basis of qualified immunity.)[2] In *Wilkinson v. Bensalem*, 822 F. Supp. 1154, the court refused to grant qualified immunity to a defendant who acting as presiding officer of Township Council may have violated a member of the public's First Amendment rights. "In cases factually similar to the one before us, courts have consistently recognized that local officials presiding over duly-elected public meetings may offend First Amendment rights when they make *ad hoc* parliamentary rulings." Id. at 1158. Recently, in *Brown v. Smythe*, 780 F. Supp. 274, and later 1993 U.S. Dist. Lexis 16365, the plaintiff who was a member of City Council was awarded $24, 920.53 for wrongdoings caused by violations of her First Amendment rights resulting from *ad hoc* parliamentary rulings in City Council. Absolute immunity on the basis that the presiding officer was performing his legislative functions was explicitly rejected. "In the present case, the plaintiff avers that the Borough Council Member defendants engaged in deliberative and protracted effort to deprive the plaintiff of her ability to use a public forum. This alleged conduct is not related to the business of legislature. Indeed, the conduct is not related to any legitimate business of Borough Council. The alleged civil rights violation was not a policy-making activity, but a calculated and extended effort to deprive the plaintiff of her constitutionally protected rights." 780 F. Supp. 274, 279.

To be sure, a presiding officer has broad authority to make parliamentary rulings in the form of time, manner, and place restrictions which are content-neutral or aimed at content-neutral secondary effects within the meaning of *Renton v. American Minitime Theatres*, 475 U.S. 41, or content-based restrictions when there is "a clear and present danger that [the speech] will bring about evils that [the legislature] has the right to prevent." *Schenk v. U.S.*, 249 U.S. 49(1919), accord. *Madison Sch. Dist.* at 173. These include rulings against irrelevant speech, disruptive speech,

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[2] Judge Wilkinson, the remaining judge, granted summary judgment on the basis of absolute immunity without concluding whether the First Amendment may have been violated.

and restrictions on the length of speech. See Brennan concurrence, *Madison Sch. Dist.*. However, the hallmark of free speech is freedom from viewpoint-based regulations. See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 120 L Ed. 2d 305, (ordinance aimed at fighting words unconstitutional when only aimed at "hate based" fighting words.)

In the case at hand, as soon as I began to ask substantive questions about the constitutionality of the resolution being debated, Gee interrupted me, ruled that the resolution was constitutional, and that no further debate on the constitutionality of the resolution would be in order. Gee's purpose in doing so was obvious. He knew that if he limited debate on the constitutionality of the proposal to only allowing one side to declare "it's constitutional" and the other side declaring "no, it isn't" without any real discussion of the merits, the question of constitutionality would boil down to a simply credential test, who is more qualified to testify to the proposal's constitutionality: Vincent Lucas, a non-lawyer, or Gee, a lawyer and alleged constitutional expert and Steven McDonald, a lawyer. Thus, embarrassing questions on the constitutionality of the policy could be avoided and Gee could focus on points he believed to be in his favor, such as the amount of consultation with the university community.

It cannot be seriously contended that not allowing debate on the constitutionality of the policy did not have a significant impact on the votes taken in the Senate especially given that the **sole purpose** of the amendment I offered was to correct constitutional defects of the policy. The strongest argument opponents of the policy could have made was that the policy is unconstitutional.

Defendants will undoubtedly contend that not allowing debate on the constitutionality of the policy was a subject matter restriction aimed at speeding up enactment. In a vacuum, this might be remotely plausible. However, in this context, this cannot be taken seriously. Aside from the inherent flaw of limiting debate which obviously is relevant and aside from the fact that the policy's opponents' most powerful objection to the policy was its constitutionality, the uncontroverted evidence shows a pattern of Gee making

incorrect parliamentary rulings in order to stifle his opponents. The point of Complaint paragraph 9 is that when the rulings of Gee are viewed *in toto* along with the fact that he participated in debate in a blatantly partisan manner contrary to the Senate rules, they show a clear attempt on the part of Gee to prejudice the votes of the Senate to push through the policy. At every turn, Gee made incorrect rulings to the manifest detriment of those who opposed his views.

The rulings of Gee are additionally suspect because they are the rulings of one man, obviously opposed to those he ruled against, as opposed to the rulings of the Senate by vote. The Courts have been traditionally wary of situations where they may suspect that officials may use their broad authority to restrict protected speech. See *Staub v. Baxley*, 355 U.S. 313 (1958), *Shuttlesworth v. Birmingham*, 349 U.S. 147 (1969).

By violating the First Amendment rights of Senate members with content-based rulings, Gee took actions which the Senate could not even have done by formal vote. The caselaw, including the cases the defendants cite, clearly indicate that when the Constitution is violated, its violation is subject to judicial review.

Plaintiff's Supplemental Memorandum Opposing Dismissal 13-15:

IIIb. The complaint is sufficient for the plaintiff to pursue a First Amendment challenge.

It is simply false that "the facts stated in Lucas' complaint [cannot] fairly be stressed to encompass a constitutional challenge to the defendants' actions" contra Defendants Reply Memorandum at 2 (emphasis added). The relevant portions of the complaint are 8(f), 8(g), and 9(c). In particular, 9(c) states "E. Gordon Gee ... used his power as chair in a blatantly illegal manner to actively suppress debate which tended to oppose his expressed position on S.D. #93-26 is consistent with the U.S. Constitution." Complaint paragraph 9 goes beyond the recitation of all the rules Gee violated to allege that Gee violated the Senate rules "to prejudice the outcome of votes

taken in the Senate." If these allegations are true, Gee clearly used his power to suppress the speech of those whose viewpoint he opposes -- contrary to First Amendment principles.

Contrary to defendants' implications, complaints filed in state courts in the state of Ohio generally need not cite any specific statutes violated and almost never detail specific legal theories on which the claims are based. See, e.g., the sample complaints in McCormac, Ohio Civil Practice 2d, @@5.22-5.27. In fact, as McCormac states "the rules make clear that a pleader is not bound by any particular theory of a claim but that the facts of the claim as developed by the plaintiff establish the right to relief" Id. @ 5.01 (footnote omitted, emphasis added). Further, "the complaint must contain either direct allegations on every material complaint necessary to sustain a recovery on any legal theory (not necessarily the legal theory of the pleader), or contain allegations from which an inference fairly may be drawn that evidence on these points will be introduced at trial" Id. @ 5.02. (footnote omitted, emphasis added). My "lengthy and highly specific exposition" of citations of the Revised Code was included to show how a violation of the Senate rules of order entails a violation of the laws of the state of Ohio. However, by no means, does its inclusion mean that the defendants may not have in their same actions violated some other laws as well.

The defendants' legal conclusions, if true, would put all plaintiffs in the state of Ohio in a procedural straightjacket unwarranted by anything in the Civil Rules --- while the defendants would be completely free to use whatever legal theories they wish, the plaintiffs would be confined to only use theories they had included in the complaint. Thus, would-be plaintiffs would be required to foresee every legal theory the defendants might use and be sure to include something in their complaint to counter that theory. In this case, the defendants' defense is, in essence, that violations of parliamentary law are not justiciable unless they violate the constitution or another extrinsic law that the parliament has no power to change. Well, as a matter of fact, the defendants did violate the Constitution. If I had the power to predict

the future, I would have gladly included my First Amendment theory specifically in the complaint. However, I do not believe the Civil Rules require the possession of supernatural powers.[8]

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[8] Even if the Court found defendants' argument valid, the appropriate procedure would be to require the plaintiff to amend his complaint. CivR 15(A) states "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served." To this date, the defendants still have not served an answer. The defendants can hardly be said to have been unduly prejudiced by such an amendment since the defendants were given notice that a First Amendment challenge would be pursued in Plaintiff's Memoranda, served while, by the defendants own admission, the case was still in the pleading stage. However, since the defendants have already been duly notified of the First Amendment claims, making such a requirement would only be an exercise in futility.

IN THE COURT OF APPEALS, TENTH DISTRICT
FRANKLIN COUNTY, OHIO

ON APPEAL FROM THE COURT OF COMMON PLEAS OF
FRANKLIN COUNTY

Vincent Lucas

residential address:
2157 Summit St., Apt. 2
Columbus, OH 43201

address for service of documents:
3180 Smith Lab
174 W. 18th Ave.
Columbus, OH 43210
Plaintiff-APPELLANT,

94APE09 1343

v.

Case No. 94CVH-05-3123

E. Gordon Gee
205 Bricker Hall
190 N. Oval Mall
Columbus, OH 43210,

James Nichols
Suite B Riverwatch
384 W. Lane Ave.
Columbus, OH 43210,
and
The Ohio State University
378 Bricker Hall
190 N. Oval Mall
Columbus, OH 43210
Defendants-APPELLEES.

ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing the First and Fourteenth Amendment issues of this case.

2. Even ignoring the constitutional issues of this case, the trial court erred in holding that it lacked jurisdiction over the subject matter of this case.

3. The trial court erred in holding that the actions of the Board of Trustees of Ohio State University on June 3, 1994 rendered this case moot, especially with regards to the injunctive relief sought.

4. The trial court erred in not granting Plaintiff's motion for a continuance of the non-oral hearing set for Aug. 3, 1994 on Defendants' Motions to Dismiss, NKA Motion for Summary Judgment, where such continuance was sought because Defendant's Motion for a Protective Order, filed July 15, 1994, substantially delayed Plaintiff's discovery efforts.

RESPECTFULLY SUBMITTED,
/s/ Vincent Lucas
Vincent Lucas
3180 Smith Lab
174 W. 18th Ave.
Columbus, OH 43210
Phone 294-8515
Plaintiff-Appellant

PROOF OF SERVICE

Plaintiff-Appellant served the foregoing on Steven McDonald, attorney for the Defendants-Appellees, by ordinary U.S. mail to his address at 33 W. 11th Ave., Suite 209, Columbus, OH 43201 on September 16, 1994

/s/ Vincent Lucas
Plaintiff-Appellant

Appellant's Brief, Court of Appeals, at 25:

> Moreover, the Appellees cannot claim to have been prejudiced by the inclusion of the First Amendment claims in the case or claim ignorance of them. While still in the pleading stage, the Appellant gave notice to the Appellees in Pls.' Mem. Opp'n. Mot. Dismiss that he would pursue a First Amendment challenge to the Appellees' actions, in direct response to the Appellants' claim that the courts could not interfere in the affairs of a legislative body unless the constitution or some other law beyond the control of that legislative body were violated, and ever since the First Amendment issues were a prominent part of the Appellant's legal arguments.

Appellees' Brief, Court of Appeals, at 5 ("Statement of the facts and of the case") (footnote omitted, italics added):

> On the basis of these two events, Ohio State also sought the dismissal of Lucas's complaint on the ground that it had been mooted by the independent action of the Board of Trustees and that, having lost office, he no longer had standing to seek prospective injunctive relief. See Supplemental Memorandum of Defendants in Support of Their Motion to Dismiss. Lucas challenged these assertions and, in a further effort to avoid dismissal, *attempted to recast his highly specific, class action complaint about parliamentary procedure as a claim that he had been deprived of his individual constitutional rights. See Plaintiff's Supplemental Memorandum Opposing Dismissal.*

Appellant's Motion for Reconsideration, Court of Appeals, at 4-6:

> **I. Assignment of error 1**
>
> **A. Appellant did advance his First and Fourteenth Amendment theories in the trial court**
>
> In this Court's decision of June 1, 1995, the Court states
>
> "[P]laintiff did not raise [his First and Fourteenth Amendment] questions in the trial court. ... [Plaintiff's first

and fourteenth amendment] claims were [not] advanced by the plaintiff in the trial court ..."

However, the First and Fourteenth Amendment questions that the Appellant raised in this Court were raised in the trial court.

On June 7, 1994, the Defendants filed their motion to dismiss seeking to have the case dismissed in part because of the doctrine of nonjusticiability of the internal affairs of a legislative body. On June 21, 1994, the Plaintiff filed a motion for summary judgment, memorandum in opposition to dismissal and memorandum supporting plaintiff's motion for summary judgment. In that motion, the Plaintiff sought in part "declaratory judgment that E. Gordon Gee violated the First Amendment constitutional rights of plaintiff Vincent Lucas by his actions in presiding over the University Senate meeting held on April 9, 1994."[1] Moreover, in Plaintiffs' Memorandum in Opposition to Dismissal, the Appellant opposed dismissal in part on the grounds that the Appellees violated the First Amendment rights of senators by his "content based restriction on speech" and that violations of first amendment rights by the internal affairs of a legislative body were justiciable. *Id.* at 5-8. The Plaintiff cited various cases in that memorandum that showed that violations of first amendment rights by legislative bodies were considered justiciable and concluded that "[t]he caselaw, including the cases the defendants cite, clearly indicate that when the Constitution is violated, its violation is subject to judicial review," *id.* at 8, and the Plaintiff submitted an affidavit that supported his contention

[1]Because the Defendants had raised the question of whether the Plaintiff was engaged in the unauthorized practice of law by instituting a class action, the Plaintiff sought in that motion only judgment "on the claims he has personally and not the claims of the entire class." Therefore, the plaintiff only sought declaratory judgment regarding his first amendment rights and not the rights of the remainder of the class, although the remainder of the class had similar first amendment claims, as Gee's ruling was not just that Lucas could not discuss the constitutionality of the pending resolution but that none of the Senators could. Hence, there is nothing "inconsistent" between the first amendment issues raised and his class claims, since the first amendment claims applied to the rest of the class as well, *contra* Appellees' Br. at 8.

that the First Amendment rights of senators had been violated. Affidavit of Vincent Lucas Opposing Dismissal and For Summary Judgment for Plaintiff ¶¶ 1 and 2. Although the motion for summary judgment was subsequently withdrawn on July 8, 1994 due to a procedural error, neither Plaintiffs' Memorandum in Opposition to Dismissal nor the Affidavit of Vincent Lucas Opposing Dismissal and for Summary Judgment for the Plaintiff, in which the Plaintiff opposed dismissal on constitutional grounds, were withdrawn.

On June 30, 1994, the Defendants served Defendants' Reply Memorandum in Support of their Motion to Dismiss, and, on July 7, 1994, the Defendants served Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. In both those memoranda, the Defendants attempted to address the various constitutional issues raised by the Plaintiff, albeit with little success. Defendants' Reply Mem. Supp. Mot. Dismiss. at 2-4; Defs.' Mem. Opp'n Mot. Summ. J. at 4-6.

On July 6, 1994, the trial court converted defendants' motion to dismiss on the grounds that plaintiff failed to state a claim upon which relief could be granted into a motion for summary judgment and set a hearing date of August 3, 1994.

On July 21, 1994, the Defendants served a Supplemental Memorandum in Support of their Motion to Dismiss in which they raised other grounds for dismissing the action, and on August 3, 1994, the Plaintiff filed Plaintiff's Supplemental Memorandum Opposing Dismissal, in large part to address the grounds for dismissal newly raised by the defendants' supplemental memorandum. However, in the plaintiff's supplemental memorandum at 13-15 the plaintiff continued to assert his first amendment theory and addressed assertions made in the Defendants' Reply Memorandum in Support of their Motion to Dismiss and Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment that the plaintiff could not pursue his first amendment theory because he had not raised it in his complaint. Plaintiff also pointed out that "the actions of the Board [of Trustees] on June 3 are irrelevant to

the question of injunctive ... relief against Gee specifically." *Id.* at 5.

As these memoranda clearly show, the Appellant did assert his first amendment theory in the trial court, in direct response to the Appellees' assertion that the internal affairs of the senate were not justiciable unless they violated constitutional restraints. The Appellant stood by his first amendment theory in the trial court ever since he asserted it, and the Appellees had a full opportunity to respond to it in the trial court.

Copies of these various memoranda are contained in the Appendix.

Appellant's Motion for Reconsideration, Court of Appeals, at 9:
As the Ohio Supreme Court has consistently held,

"[P]leadings shall be so construed as to do substantial justice, and to that end, shall be construed liberally in order that the substantive merits of the action may be served."

MacDonald v. Bernard, 1 Ohio St. 3d 85, 86 n. 1 (1982). *See also* Wright & Miller, Federal Practice and Procedure: Civil 2d § 1286.

This is especially so since the pleadings were written *pro se* by the Appellant, "a physics student and nonlawyer" who has no formal legal training and had no litigation experience prior to this action. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Action Determination at 4. As the United States Supreme Court has consistently held, where an action involves issues of the violation of rights protected under the United States Constitution

"a *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"

Estelle v. Gamble, 429 U.S. 97, 106 (1976) (emphasis added) (citing the Court's unanimous decision in *Haines v. Kerner*, 404 U.S. 519 (1972) (*per curiam*)). *See also, e.g., Boag v. MacDougall*, 454 U.S. 364 (1982) (*per curiam*) (reversing court of appeals dismissal of *pro se* complaint as "frivolous" because the complaint liberally construed stated a cause of action); *Williams v. Browman*, 981 F. 2d 901, 903 (6th Cir. 1992); *Sellers v. Morris*, 840 F. 2d 352, 355 (6th Cir. 1988) (*pro se habeas corpus* petition to be adjudged with "tolerance and forbearance"); *Jourdan v. Jabe*, 951 F. 2d 108, 110 (6th Cir. 1991) ("The drafting of a formal pleading presupposes some degree of legal training or, at least, familiarity with applicable legal principles, and *pro se* litigants should not be precluded from resorting to the courts merely for want of sophistication.")

Appellant's Memorandum in Support of Jurisdiction i-ii:
PROPOSITIONS OF LAW

Proposition of law No. 1: The Ohio Rules of Civil Procedure do not require a plaintiff to plead the legal theory or basis for his action but only require the pleader to plead circumstances entitling him to relief by pleading facts which, if proven, establish his claim. When a complaint does suggest a legal theory or basis for an action, the pleader is not required to amend his complaint to pursue an alternate legal theory or basis for his action, but the complaint is sufficient for the pleader to pursue any legal theory plaintiff raises in the trial court as long as that complaint pleads operative facts sufficient to pursue that legal theory. *Illinois Controls v. Langham*, 70 Ohio St. 3d 512 (1994), paragraph 6 of syllabus approved and followed.

Proposition of law No. 2: When a state court determines the sufficiency of a complaint for the purposes of raising claims of violations of rights protected under the federal constitution, state courts should follow federal standards regarding the sufficiency of the complaint, to the extent those standards are more lenient than that state's standards.

Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949) followed.

Proposition of law No. 3: State courts should follow federal standards regarding the sufficiency of a non-lawyer's *pro se* complaint for the purposes of raising claims of violations of rights protected under the federal constitution, to the extent those standards are more lenient than that state's standards. *Brown v. Western Ry. of Alabama*, 338 U.S. 294 (1949) followed.

Proposition of law No. 4: Violations of First Amendment rights and rights guaranteed under the Ohio Constitution, Article I, Section 11, by the internal affairs of a legislative body give rise to justiciable controversies. *Madison Joint School District v. Wisconsin Employment Relations Comm'n.*, 429 U.S. 167 (1976), *Kucinich v. Forbes*, 432 F. Supp. 1101 (N.D. Ohio 1977), and *Princeton Educ. Assn. v. Princeton Board of Ed.*, 480 F. Supp. 962 (S.D. Ohio 1979) followed.

Proposition of law No. 5: When a presiding officer of a legislative body makes a ruling restricting "pure speech" by confining debate to any and all matters except a disfavored topic plainly relevant to the pending legislation and the government cannot show (1.) that a clear and present danger is presented to society by the pure speech proscribed and (2.) that the restriction is reasonably tailored toward and reasonably necessary for furthering legitimate government interests, such ruling violates the First and Fourteenth Amendments of the U.S. Constitution and Article I, Section 11, of the Ohio Constitution.

Proposition of law No. 6: A presiding officer of a legislative body cannot arbitrarily defeat the will of the majority by refusing to entertain or put forward motions, by wrongfully declaring the result of a vote, or by refusing to permit the expression of the will of the majority. When a presiding officer repeatedly and deliberately acts to block the body from considering lawfully made motions and blocks the

body from invoking its own jurisdiction to control its affairs by blocking the body from considering lawfully made motions that would challenge his authority to block the body from considering motions, there exists the power in the other branches of government upon a request of a member of that body to step in on behalf of that body to enjoin that officer from obstructing the body's business.

Proposition of law No. 7: When a plaintiff seeks in part injunctive relief enjoining a presiding officer from unlawfully blocking a deliberative body from considering measures brought by members of that body, plaintiff's request for injunctive relief does not moot by the subsequent passage or defeat of the measure that was pending when the violations of law plaintiff complained about occurred when the subsequent passage or defeat of the measure does nothing to prevent that presiding officer from continuing to block the body from considering lawfully made measures in the future.

Proposition of law No. 8: A trial court commits prejudicial error in failing to consider and rule upon a motion requesting a continuance of the hearing date for a motion for summary judgment when the party moving for a continuance could have obtained potentially material discovery that potentially could have changed the outcome of a ruling on a summary judgment motion adverse to that party if the continuance were granted.

Appellant's Memorandum in Support of Jurisdiction 3-7:

Argument in support of the propositions of law

Proposition of law No. 1: The Ohio Rules of Civil Procedure do not require a plaintiff to plead the legal theory or basis for his action but only require the pleader to plead circumstances entitling him to relief by pleading facts which, if proven, establish his claim. When a complaint does suggest a legal theory or basis for an action, the pleader is not required to amend his complaint to pursue an alternate legal theory or basis for his action, but the complaint is sufficient for the pleader to pursue any legal theory plaintiff raises in the trial court as long as that complaint pleads operative facts sufficient to pursue that legal theory. *Illinois Controls v. Langham,* 70 Ohio St. 3d 512 (1994), paragraph 6 of syllabus approved and followed.

In the Court of Appeals's decision, the court states "plaintiff did not raise [the First and Fourteenth Amendment] questions in the trial court." Decision at 4. However, the plaintiff plainly did raise his First Amendment theory in the trial court in Plaintiffs' Memorandum in Opposition to Dismissal. (Appx. 15-18).[2] The only conceivable objection therefore to the Appellant's assertion of his First Amendment theory is that he did not specifically cite the First Amendment in his complaint and specifically plead his first amendment theory in his Complaint. However, as this court recently stated in *Illinois Controls v. Langham,* 70 Ohio St. 3d 512 (1994), a plaintiff simply is not required to plead the legal basis or theory of his action in his complaint.

---

[2] A motion for reconsideration is currently pending in the Court of Appeals on the basis of this apparent factual error. Appellees concede that Appellant raised both the fact that Appellant had raised this issue in the trial court and all legal issues raised in the motion for reconsideration prior to the motion for reconsideration in Appellant's briefs in that court. Appellees' Brief in Opposition to Appellant's Motion for Reconsideration at 1. ("Appellant Vincent Lucas's motion for reconsideration raises no new issues for the Court's consideration.")

"Civil rule 8(A) requires only that a pleading contain a short and plain statement of the circumstances entitling the party to relief. A party is not required to plead the legal theory of recovery..."

Id. at Syl. ¶ 6 (emphasis added).

"'The rules make clear that a pleader is not bound by any particular theory of a claim but that the facts of the claim as developed by the proof establish the right to relief.' McCormac, Ohio Civil Rules Practice (2d ed. 1992) 102, Section 5.01.

Accordingly, it was sufficient that [the plaintiffs] set forth *facts* which, if proven, establish their claim for relief. It was not incumbent upon them to plead the law..."

Id. at 526 (emphasis added, citations omitted). As this Court also held in *Westbrook v. Prudential Ins. Co.*, 37 Ohio St. 3d 166, 168 (1988) (*per curiam*), when a plaintiff does refer to a particular legal theory or particular statutes in his complaint as a basis for relief, such references may be "instructive," but a plaintiff is not bound by them. "The availability of the relief, of course, is not dependent upon the allegations of the complaint," since "pursuant to Civil Rule 8(A), a plaintiff need not allege the legal basis for his action." *Id.*

These two cases embody long-standing Ohio law on his question, *see Millican v. Mr. Steak*, 38 O. Misc. 24 (Ct. C.P. Cuyahoga Co. 1973); 74 O. Jur. 3d *Pleading* §§ 40, 74, and the jurisprudence of countless other jurisdictions, *Colonial Refrigerated Transport v. Worsham*, 705 F. 2d. 821, 825 (6th Cir. 1983) ("The 'theory of pleadings' doctrine, under which a plaintiff must succeed on those theories that are pleaded or not at all, has been effectively abolished under the federal rules"); Friedenthal, Kane & Miller, Civil Procedure (2d ed. 1993) § 5.7 at 253 ("a party is permitted to recover whenever she had a valid claim, even though her attorney fails to perceive the proper basis of the claim at the pleading stage"); 5 Wright & Miller, Federal Practice and

Procedure: Civil 2d (1970) § 1219. As the Hamilton Court of Appeals aptly put it, a pleading is sufficient if it contains

"either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain[s] allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial."

Fancher v. Fancher, 8 O. App. 3d 79 (1982) at Syl. ¶ 2 (emphasis added) (quoted in 79 O. Jur. 3d *Pleading* § 74).

Plaintiff did allege "facts which, if proven, establish the claim" of deprivation of first amendment rights in his Complaint by alleging, *inter alia*, "Gee ... ruled that any debate on the legality under the U.S. Constitution of the resolution S.D. #93-26 was out of order" and "Gee ... used the power of the chair to suppress debate which opposed his position on whether S.D. #93-26 is consistent with the U.S. Constitution" and that he did so "to prejudice the outcome of the votes taken in the Senate." In first amendment legal jargon, this alleges Gee made a content-based restriction on speech aimed at achieving a constitutionally impermissible goal. Accordingly, the Court of Appeals's ruling is directly contrary to this Court's precedents.

Proposition of law No. 2: When a state court determines the sufficiency of a complaint for the purposes of raising claims of violations of rights protected under the federal constitution, state courts should follow federal standards regarding the sufficiency of the complaint, to the extent those standards are more lenient than that state's standards. *Brown v. Western Ry. of Alabama*, 338 U.S. 294 (1949) followed.

Even if this Court were inclined to overrule its precedent issued less than a year ago in favor of returning Ohio to 18th century style pleading practice, this Court's inquiry would not end there. It is clear that under the Federal rules as construed by federal courts, a pleader may pursue

alternative legal theories of his claim not pled in the Complaint. *See supra.* This case then would clearly fall under the purview of *Brown v. Western Ry. of Alabama,* 338 U.S. 294 (1949), in which the Supreme Court held that Alabama could not follow its state's pleading practice of construing pleadings "most strongly against the pleader" when its state courts hear actions involving federally created rights but must use federal standards.

"Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. 'Whatever springs the State may set for those endeavoring to assert rights that the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved."

Id. at 298-299 (emphasis added, citations omitted). As an over-exacting rule for meticulous pleadings which the federal courts have uniformly determined "has no place under federal practice," Wright & Miller § 1219 at 190, Ohio is preempted from requiring a pleader to rely in the trial court only on theories asserted in his Complaint to the extent his case involves federal rights.

Proposition of law No. 3: State courts should follow federal standards regarding the sufficiency of a non-lawyer's *pro se* complaint for the purposes of raising claims of violations of rights protected under the federal constitution, to the extent those standards are more lenient than that state's standards. *Brown v. Western Ry. of Alabama,* 338 U.S. 294 (1949) followed

Not only is it clear that under both Ohio and Federal law the plaintiff's Complaint was sufficient for him to pursue his First Amendment theory, but even if it were technically

deficient, plaintiff would be entitled to have it liberally construed in his favor as a *pro se* complaint.

"[A] *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' ..."

Estelle v. Gamble, 429 U.S. 97, 106 (emphasis added). *Accord Haines v. Kerner*, 404 U.S. 519 (1972); *Boag v. MacDougall*, 454 U.S. 364 (1982); *Jourdan v. Jabe*, 951 F. 2d 108, 110 (6th Cir. 1991).

Proposition of law No. 4: Violations of First Amendment rights and rights guaranteed under the Ohio Constitution, Article I, Section 11, by the internal affairs of a legislative body give rise to justiciable controversies. *Madison Joint School District v. Wisconsin Employment Relations Comm'n.*, 429 U.S. 167 (1976), *Kucinich v. Forbes*, 432 F. Supp. 1101 (N.D. Ohio 1977), and *Princeton Educ. Assn. v. Princeton Board of Ed.*, 480 F. Supp. 962 (S.D. Ohio 1979) followed.

It has now been established beyond doubt in Ohio that violations of First Amendment rights by the internal affairs of a legislative body give rise to justiciable controversies. *Kucinich v. Forbes*, 432 F. Supp. 1101 (N.D. Ohio 1977); *Princeton Educ. Assn. v. Princeton Bd. of Ed.*, 480 F. Supp. 962 (S.D. Ohio 1979). In both cases, injunctions were issued against a legislative body's rules of procedure which violated First Amendment rights.

Proposition of law No. 5: When a presiding officer of a legislative body makes a ruling restricting "pure speech" by confining debate to any and all matters except a disfavored topic plainly relevant to the pending legislation and the government cannot show (1.) that a clear and present danger is presented to society by the pure speech proscribed and (2.) that the restriction is reasonably tailored toward and reasonably necessary for furthering legitimate government interests, such ruling violates the First and

Fourteenth Amendments of the U.S. Constitution and Article I, Section 11, of the Ohio Constitution.

In *Princeton Educ. Assn.*, 480 F. Supp. at 971 n. 13, the court emphasized that although First Amendment principles allowed a public body to confine debate at its meetings to specified subject matter, such as by excluding debate on matter irrelevant to some pending legislation, that power does not extend to confining "public discussion to any and all matters except [a] disfavored topic" plainly relevant to the legislation. Gee's ruling restricting debate to all matters except the constitutionality of the proposed Code change was such a ruling.

Both in the trial court and the court of appeals, the defendants were unable to show that "a clear and present danger [was] presented to society by the pure speech" Gee's ruling proscribed, *Kucinich v. Forbes* at 1111, *Princeton Educ. Assn.* at 969, that the restriction was aimed at and tailored toward furthering legitimate government interests, *Kucinich* at 1111, *Princeton Educ. Assn.* at 969, or that such a content based restriction was "reasonably necessary" in light of "adequate content-neutral alternatives" that could have as effectively furthered whatever governmental interests, if any, the restriction was aimed at furthering, *R.A.V. v. City of St. Paul,* 120 L. Ed. 2d 305, 326 (1992).

"In fact the only interest distinctively served by [Gee's ruling] is that of displaying [Gee's] special hostility toward [the subject of the Code change's constitutionality and those who wished to debate the topic]. That is precisely what the First Amendment forbids."

R.A.V. at 326 (footnote omitted).

Appellant's Memorandum in Support of Jurisdiction 8-9:

While the trial court addresses its assertion that the case is moot with respect to the declaratory relief sought to declare the votes of the Senate void by virtue of the Board of Trustees' June 3 ratification of the Senate's vote, it

completely ignores the fact that injunctive relief prohibiting Gee from violating the rights of Senators in future meetings was sought as well. The Board of Trustees' action obviously did nothing to prevent Gee from violating the rights of Senators in future Senate meetings and accordingly the case is not moot with respect to the injunctive relief sought. A case seeking in part injunctive relief does not become moot with respect to the injunctive relief sought "if the practices sought to be enjoined are likely to occur again," *Sigma Chi Fraternity v. Regents of the University of Colorado,* 258 F. Supp. 515, 523 (D. Colo. 1966), and "[t]he defendant[s] [are] free to return to [their] old ways" which gave rise to the action in the first place, *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). While this error was pointed out in plain terms to the court of appeals, the courts of appeals also failed to explain why the request for injunctive relief was moot.

IN THE COURT OF COMMON PLEAS

OF FRANKLIN COUNTY, OHIO

Vincent Lucas
3180 Smith Lab
174 W. 18th Ave.
Columbus OH, 43210

On behalf of himself,
the members of the University Senate
of the Ohio State University,
the faculty and staff of the Ohio State University,
and all others similarly situated
Plaintiffs

vs.

E. Gordon Gee
205 Bricker Hall
190 N. Oval Mall
Columbus OH, 43210,

James Nichols
Suite B Riverwatch
384 W. Lane Ave.
Columbus, OH 43210
and
The Ohio State University
378 Bricker Hall
190 N. Oval Mall
Columbus OH, 43210
Defendants

COMPLAINT

1. Plaintiffs bring this action on behalf of themselves and other persons similarly situated who are so numerous that joinder of all members is impracticable.

2. There are questions of law or fact common to all members of the class.

3. The claims or defenses of the representative parties are typical of the claims or defenses of the class.

4. The representative parties will fairly and adequately protect the interest of the class.

5. E. Gordon Gee is the president of the Ohio State University and was the presiding officer of the University Senate of the Ohio State University ("the Senate") in the meeting held on April 9, 1994.

6. James Nichols is the parliamentarian of the Senate and acted as parliamentarian of the Senate in the meeting held on April 9, 1994.

7. Vincent Lucas is a graduate student at the Ohio State University and is a voting member of the Senate.

8. E. Gordon Gee, while acting as presiding officer of the Senate in the meeting held on April 9, 1994 blatantly disregarded the Bylaws of the University Senate of the Ohio State University, thereby violating the rules of the University Faculty of the Ohio State University at 3335-5-45, the bylaws of the Board of Trustees of the Ohio State University at 3335-1-03(B) and 3335-1-04(B), and the laws of the State of Ohio at O.R.C. 3335.02(A), 3335.08, and 3345.021. His course of conduct included the following:

(a) E. Gordon Gee, contrary to Robert's Rules of Order, Newly Revised (1990) at Section 18, p. 221 and the bylaws of the Senate at 3335-19-01 and 3335-19-13(C), ruled out of order a motion lawfully made by Mr. Vincent Lucas to suspend the orders of the day by a two-thirds vote, notwithstanding a point of order made by Mr. Lucas that such motion was in order.

(b) E. Gordon Gee, contrary to Robert's Rules of Order, Newly Revised (1990) at Section 24, p. 254 et seq., 257 and the bylaws of the Senate at 3335-19-01, refused to allow a motion lawfully made by Mr. Lucas to appeal the decision of the chair referred to above.

(c) E. Gordon Gee, contrary to Robert's Rules of Order, Newly Revised (1990) at Section 30, p. 279 and Section 44, p. 412 et seq. and the bylaws of the Senate at 3335-19-01, ruled out of order a motion lawfully made by Mr. Lucas to take a roll call vote on a motion to postpone until the next Senate meeting consideration of the resolution S.D. #93-26, a resolution to

amend those sections of the Code of Student Conduct that pertain to sexual harassment.

(d) E. Gordon Gee, contrary to Robert's Rules of Order, Newly Revised (1990) at Section 23, p. 247 et seq. and Section 60, p. 656-657 and the bylaws of the Senate at 3335-19-01, refused to rule properly on a point of order lawfully made by Mr. Lucas that limiting debate on a debatable motion requires a two-thirds vote.

(e) E. Gordon Gee, contrary to Robert's Rules of Order, Newly Revised (1990) at Section 42, p. 380-382 and the bylaws of the Senate at 3335-19-01 and notwithstanding a point of order made to the contrary, improperly closed debate on a motion to postpone until the next Senate meeting consideration of S.D. #93-26 despite the fact that there were members of the Senate who had not exhausted their right to debate and who attempted to seek recognition for the purposes of debate and despite the fact that the motion to postpone was a debatable motion and no vote had taken place to limit debate.

(f) E. Gordon Gee, contrary to Robert's Rules of Order, Newly Revised (1990) at Section 42, p. 380 et seq. and the bylaws of the Senate at 3335-19-01, improperly ruled that any debate on the legality under the U.S. Constitution of the resolution S.D. #93-26 was out of order.

(g) E. Gordon Gee, contrary to Robert's Rules of Order, Newly Revised (1990) at Section 24, p. 254 et seq., 257 and Section 60, p. 656-657 and the bylaws of the Senate at 3335-19-01, refused to acknowledge a motion made by Mr. Lucas to appeal the decision of the chair that the proposal referred to in S.D. #93-26 is consistent with the U.S. Constitution and that any debate on the constitutionality of the proposal is out of order.

(h) E. Gordon Gee, contrary to Robert's Rules of Order, Newly Revised (1990) at Section 42, p. 380-382 and the bylaws of the Senate at 3335-19-01, did not allow debate on an amendment to S.D. #93-26 lawfully made by Mr. Lucas notwithstanding a point or order previously made to the contrary and despite the fact that the motion to amend was a debatable motion and no vote had been taken to limit debate.

(i) E. Gordon Gee, contrary to Robert's Rules of Order, Newly Revised (1990) at Section 30, p. 279 and Section 44, p. 412 et seq. and the bylaws of the Senate at 3335-19-01, failed to

acknowledge properly a motion lawfully made by Mr. Lucas to take a roll call vote on the passage of the resolution S.D. #93-26.

9. E. Gordon Gee, while acting as presiding officer of the Senate in the meeting held on April 9, 1994 disregarded the Bylaws of the Senate, thereby violating the rules of the University Faculty at 3335-5-45, the bylaws of the Board of Trustees at 3335-1-03(B) and 3335-1-04(B), and the laws of the State of Ohio at O.R.C. 3335.02(A), 3335.08, and 3345.021 by using undue influence to prejudice the outcome of votes taken in the Senate. His course of conduct included the following:

(a) E. Gordon Gee, in violation of Robert's Rules of Order, Newly Revised (1990) at Section 42, p. 389-390 and the rules of the Senate at 3335-19-01, while acting as presiding officer of the Senate not only failed to remain impartial during the course of debate on resolution S.D. #93-26 but actively engaged in the debate in a blatantly partisan manner.

(b) E. Gordon Gee, contrary to Robert's Rules or Order, Newly Revised (1990), the rules of the Senate at 3335-19-01, ruled in a manner contrary to the laws of the Senate against motions made which tended to oppose his expressed position and to the probable detriment of those who opposed his position. Specifically he:

(i) did not allow motions to take roll call votes on motions pertaining to S.D. #93-26,

(ii) made rulings that attempted to suppress debate on S.D. #93-26,

(iii) refused to acknowledge points of order made against his rulings and/or refused to rule properly on points of order made against his rulings,

(iv) refused to allow motions to appeal from his rulings.

(c) E. Gordon Gee, in violation of Robert's Rules of Order generally and specifically at Section 42, the rules of the Senate at 3335-19-01, used his power as chair in a blatantly illegal manner to actively suppress debate which tended to oppose his expressed position on S.D. #93-26. He closed debate at several points on debatable motions while members of the Senate who opposed his expressed position attempted to gain the floor notwithstanding the fact that no vote had been taken to limit debate. In addition, he

used the power of the chair to suppress debate which opposed his position on whether S.D. #93-26 is consistent with the U.S. Constitution.

10. Christopher Meade, an undergraduate student at the Ohio State University and a voting member of the Senate, on April 9, 1994 in the Senate lawfully made a motion to amend S.D. #93-26. E. Gordon Gee used undue influence to prejudice the vote taken on the motion by means described in point 9 of this complaint and especially by failing to remain impartial during the course of debate on S.D. #93-26 by participating in debate in a blatantly partisan manner.

WHEREFORE, pursuant to Robert's Rules of Order, Newly Revised (1990) at Section 42, p. 382 and the bylaws of the Senate at 3335-19-01, plaintiffs pray for a declaratory judgment that those votes taken in the Senate on April 9, 1994 on the motion to postpone consideration of S.D. #93-26, the motion to amend S.D. #93-26 made by Vincent Lucas, and the motion to adopt S.D. #93-26 be declared null and void. Plaintiffs also pray for a declaratory judgment that the vote taken in the Senate on April 9, 1994 on the motion to amend S.D. #93-26 made by Christopher Meade be declared null and void.

Plaintiffs further pray for a permanent injunction against defendant Gee requiring that he comply fully and at all times in the future with the established rules of the Senate and the Board of Trustees of the Ohio State University.

Plaintiffs further pray that defendants herein be required to reimburse and compensate the plaintiffs in the amount of court costs and reasonable attorney fees which were necessary to be incurred due to the wrongful actions of the defendants.

/s/ Vincent Lucas
Plaintiff

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNT, OHIO

VINCENT LUCAS, et al.
Plaintiffs,

Case No. 94CVH-05-3123

v.

Judge Bessey

E. GORDON GEE, et al.
Defendants.

AFFIDAVIT OF VINCENT LUCAS OPPOSING DISMISSAL AND FOR SUMMARY JUDGEMENT FOR PLAINTIFF

STATE OF OHIO
COUNTY OF FRANKLIN ss.

Vincent Lucas, being duly sworn, says that:

I am Vincent Lucas, and have personal knowledge of the facts herein set forth of events that took place in the meeting of the University Senate of Ohio State University("Senate") on April 9, 1994.

1. In the meeting in question, as soon as I began to ask substantive questions about the constitutionality of the resolution being debated S.D. #93-26, Gee interrupted me, ruled that the resolution was constitutional, and that no further debate on the constitutionality of the resolution would be in order.

2. Attachment 1 is the amendment to S.D. #93-26 I offered. Its sole purpose was to correct constitutional defects of the policy. In my judgment, the best argument against the policy S.D. #93-26 is that it is unconstitutional.

3. Of all the motions I made that day, the only one that E. Gordon Gee permitted to be considered for a vote was my motion to amend.

4. The following exchange took place in the Senate meeting while considering passage of S.D. #93-26 (recollection aided by audio tapes referred to in Lucas 2nd affidavit):

LUCAS: "Point of order, uh Mr. Sp-, Mr. President. Any person, uh, any member of the Senate who wants to speak, has the right to speak so long as his rights, uh, to the floor has not been exhausted. Uh, this right to speak may only be, uh, limited by a 2/3 vote of the Senate."

GEE: "Well, uh, uh, let me point out that again in fairness that we need to get on about the business. That's one of the reasons we have a chair. Um, if, if the rights haven't been exhausted, I'm exhausted, and I think that, uh, I think we do need to vote on this, um, at least to get this, this postponement, um."

CHORUS OF CALLS TO QUESTION

6. In my opinion, Gee was the most active participant in the debate on S.D. #93-26. He often used his power as chair to immediately respond to arguments made in the debate while those who opposed his position, such as myself, had to wait to be recognized.

/s/ Vincent Lucas
Vincent Lucas
3180 Smith Lab
174 W. 18th Ave.
Columbus Oh, 43210
Phone 294-8515
Plaintiff

Sworn to me and subscribed in my presence this 21 day of June, 1994.

/s/ Paul B. Lewan
(Notary's signature)
Notary Public
State of Ohio

[notarial seal for the state of Ohio]

PROOF OF SERVICE

Plaintiff served an unnotarized copy on June 20, 1994 and a notarized copy on June 21, 1994 of the foregoing affidavit on

Steven McDonald, attorney for the defendants, by ordinary U.S. Mail to his address at 33 W. 11th Ave., Suite 209, Columbus OH, 43210.

/s/ Vincent Lucas
Plaintiff

Board of Trustees of Ohio State University resolution of June 3, 1994 enacting change in the Code of Student Conduct adopted by the University Senate on May 7, 1994[1] (Sharkey Supplem. Aff., Ex. A):

AMENDMENTS TO THE CODE OF STUDENT CONDUCT

Synopsis: Approval of the following amendments to the Code of Student Conduct are recommended.

WHEREAS the University Senate pursuant to rule 3335-1-09 of the Administrative Code is authorized to recommend through the President to the Board of Trustees the adoption of amendments to the Code of Student Conduct as approved by the University Senate; and

WHEREAS the proposed changes in the Code of Student Conduct were approved by the University Senate at its May 7, 1994 meeting as follows:

3335-25-03 Policies.

Established policies and rights exist to ensure an environment conducive to equal treatment and quality living for all members of the university community. Students violating university policy may be subject to disciplinary action.

(A) Unchanged.

(B) Sexual harassment.

Sexual harassment is prohibited, ~~and includes: sexual contact that is not freely and mutually agreeable to both parties; communications of a sexual nature, whether physical, oral, written, or pictorial that are made for the purpose of threatening, intimidating, or humiliating the person receiving such communications; solicitation of sexual contact when submission to or rejection of such contact implicitly or explicitly imposes adverse or favorable terms or conditions on employment or academic~~

~~standing.~~ SEXUAL HARASSMENT IS ANY UNWELCOME SEXUAL ADVANCE, REQUEST FOR SEXUAL FAVOR, REFERENCE TO GENDER OR SEXUAL ORIENTATION, OR OTHER PHYSICAL OR VERBAL CONDUCT OF A SEXUAL NATURE WHEN:

(1) SUBMISSION TO OR REJECTION OF SUCH CONDUCT IS USED EITHER EXPLICITLY OR IMPLICITLY AS A BASIS FOR ANY DECISION AFFECTING TERMS OR CONDITIONS OF AN INDIVIDUAL'S EMPLOYMENT, PARTICIPATION IN ANY PROGRAM OR ACTIVITY, OR STATUS IN AN ACADEMIC COURSE; OR

(2) SUCH CONDUCT HAS THE EFFECT OF UNREASONABLY INTERFERING WITH AN INDIVIDUAL'S WORK PERFORMANCE OR EDUCATIONAL EXPERIENCE, OR CREATES AN INTIMIDATING, HOSTILE OR OFFENSIVE ENVIRONMENT FOR WORKING, LEARNING, OR LIVING ON CAMPUS, AND HAS NO LEGITIMATE RELATIONSHIP TO THE SUBJECT MATTER OF A COURSE.

(Further details and procedures may be obtained in the office of student life and/or the office of ~~affirmative action~~ HUMAN RESOURCES.)

(C) through (H) Unchanged.

NOW THEREFORE
BE IT RESOLVED, That the foregoing amendments to the Code of Student Conduct be adopted as recommended by the University Senate.

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† Under University Senate procedures, any proposed change in the university administrative code must be approved at two separate meetings to be enacted. The proposed harassment policy change was debated and voted on at the Senate's April 9, 1994 meeting and final passage was approved at the May 7, 1994 Senate meeting.

Supreme Court, U.S.
FILED
MAY 21 1996
CLERK

No. 95-1737

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

VINCENT A. LUCAS, *Petitioner*

v.

E. GORDON GEE, et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE FRANKLIN COUNTY, OHIO, COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Should this Court exercise its supervisory powers to correct an alleged factual error by a mid-level state appellate court when the issue was not properly raised below and the state law relevant to that issue is, as even the petitioner concedes, already fully consistent with federal law?

2. Does a former member of an advisory university body, who has no right to participate in or speak at its meetings, unless the body, in its sole discretion, invites such participation, have standing to seek an injunction to enforce the body's internal parliamentary rules on behalf of its current members?

3. Does this Court have jurisdiction to consider whether a state trial court properly interpreted and applied that state's rules of civil procedure?

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

VINCENT A. LUCAS, *Petitioner*

v.

E. GORDON GEE, et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE FRANKLIN COUNTY, OHIO, COURT OF APPEALS

The respondents, The Ohio State University; E. Gordon Gee, the President of Ohio State and the presiding officer of its University Senate; and James L. Nichols, the Treasurer of Ohio State and the Parliamentarian of its University Senate, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Franklin County, Ohio, Court of Appeals' opinion in this case. That opinion is reported at 104 Ohio App. 3d 423, 662 N.E.2d 382 (1995), *motion for review denied*, 74 Ohio St. 3d 1418, 655 N.E.2d 738 (1995), *motion for reconsideration denied*, 74 Ohio St. 3d 1465, 656 N.E.2d 1300 (1995).

COUNTERSTATEMENT OF THE CASE

INTRODUCTION

Contrary to petitioner Vincent Lucas's characterization, this *pro se* petition for a writ of certiorari

is merely his latest step in a lengthy campaign of harassment by litigation. It appears that, for Lucas, litigation is both a game and an obsession. This is only one of four *pro se* lawsuits that he has now filed against respondents and various related parties on much the same issues. Indeed, just two weeks before he filed his petition with this Court, he refiled *this very same case* in the United States District Court for the Southern District of Ohio, apparently in an effort to prolong this litigation still further regardless of this Court's determination on his petition. In each case and at each stage, he has filed countless briefs and motions and asserted, but rarely pursued, ever-shifting theories as though he were playing "litigation dodgeball." In what is for him typical fashion, he served his petition for a writ of certiorari on respondents' counsel in an envelope that was plastered with postage stamps honoring former President Nixon and that bore the handwritten inscription "may the spirit of Richard Nixon bless these briefs."

There is no need or reason for this Court to ensnare itself in Lucas's web of vexation and gamesmanship. Over the course of the past two years, eleven judges sitting on three different courts have already considered Lucas's claims in this case at great length and have unanimously rejected them on no fewer than five separate occasions. In words that are now doubly true, they have noted that "[t]he time and effort devoted to this case by the trial court and the court of appeals far exceed[] the legal significance of the various allegations of wrongdoing complained of by [Lucas]." (Pet. 12a). Accordingly, and for the reasons set forth below, his petition for a writ of certiorari should be denied.

STATEMENT OF FACTS

On November 5, 1993, the Board of Trustees of respondent The Ohio State University voted to revise Ohio

State's university-wide sexual harassment policy so as to bring it into line with recent changes in the law. By its express terms, that policy is applicable to all faculty, staff and students at Ohio State. As such, it is also implicitly incorporated in a provision of Ohio State's Code of Student Conduct prohibiting "[v]iolation of other published University regulations, policies, or rules."

At the time of the revision of the university-wide policy, the Student Code also contained a short, express sexual harassment provision, and the University determined to replace it with the revised policy. In accordance with its informal tradition of seeking wide consultation on such matters, the University brought the proposed revision before the University Senate for an advisory vote on April 9, 1994. The University Senate is composed of administrators, faculty and students and, under University rules, is empowered to "make recommendations" to the Board of Trustees.

Prior to the meeting, appellant Vincent Lucas, a student member of the Senate, submitted a 12-page memorandum detailing various objections to the proposed revision, together with a proposed amendment. Copies of both documents were distributed to each member of the Senate before the meeting. During the meeting, Lucas spoke a number of times and at some length concerning his views on the proposed revision -- in fact, he spoke more, and more often, on the subject than any other member of the Senate. Among other things, Lucas presented his proposed amendment, addressed his reasons for making it, stated his belief that the proposed revision was unconstitutional and referred the Senate to his lengthy memorandum for further detail.

As the meeting progressed, however, Lucas became increasingly disruptive, and it became increasingly clear that

he sought to obstruct consideration of the proposed revision, not to further it. Accordingly, respondent E. Gordon Gee, who, as Ohio State's President, serves as the presiding officer of the Senate, eventually brought the discussion to a close and called for a vote. The Senate then voted to endorse the Student Code revision by the resounding margin of 69-10.

Soon thereafter, Lucas filed a *pro se*, class action lawsuit in the Franklin County, Ohio, Court of Common Pleas against Ohio State, Gee and the Senate's Parliamentarian (collectively, "Ohio State"). Lucas's complaint alleged that these respondents had "blatantly disregarded" Robert's Rules of Order and thereby committed some 17 technical violations of parliamentary procedure at the Senate meeting. On that basis, and that basis alone, Lucas asked the trial court to declare the Senate vote "null and void" "pursuant to Robert's Rules of Order," to enjoin Gee from engaging in further such "violations," and to award Lucas his costs and "attorney fees." Despite Lucas's professed belief that the new sexual harassment policy was unconstitutional, he did not challenge it in any way.

On June 6, 1994, Ohio State moved to dismiss Lucas's complaint for failure to state a claim upon which relief may be granted -- specifically, that Robert's Rules of Order and other such forms of internal parliamentary procedure do not have the status of law and are not judicially enforceable. Ohio State also noted that Lucas's lawsuit would have no practical effect even if Lucas were to prevail. Because the university-wide sexual harassment policy would remain in effect regardless of the outcome of Lucas's lawsuit, Ohio State's students would continue to be subject to it no matter what happened to the vote on the Student Code provision. On July 6, 1994, the trial court notified the parties that it was converting the motion to dismiss into a

motion for summary judgment and asked them to address the latter issue in more detail.

While Ohio State's motion was pending, two additional events of relevance occurred. First, on June 3, 1994, Ohio State's Board of Trustees voted unanimously to replace the old Student Code sexual harassment provision with the new university-wide sexual harassment policy. Second, soon after Lucas filed his complaint, the University Senate held its last meeting of the academic year and Lucas's term of office came to an end. Although Lucas subsequently sought another term, he was not reelected. On the basis of these two events, Ohio State also sought the dismissal of Lucas's complaint on the grounds that his challenge to the Senate vote had been mooted by the independent action of the Board of Trustees and that, having lost office, he no longer had standing to seek prospective injunctive relief to enforce Senate rules.[1]

On August 10, 1994, the trial court granted Ohio State's dispositive motion. In its opinion, the trial court held that the university-wide policy would continue to apply "irrespective of whether or not . . . Gee violated Robert's Rules of Order" with respect to the Student Code provision and that there was therefore no real case or controversy to be resolved; that the courts lack jurisdiction to interfere with matters of internal parliamentary procedure; and that, in any event, the case was mooted by the June 3, 1994, adoption of the Student Code provision by Ohio State's Board of

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[1] In what was apparently an effort to resurrect his standing, Lucas then filed an original action in *quo warranto* in the Franklin County, Ohio, Court of Appeals against the student who was named the alternate for the student who succeeded Lucas as a student Senator. When the Court of Appeals dismissed that case for failure to state a claim upon which relief could be granted, Lucas refiled it as a *mandamus* action against Ohio State and the student in the Franklin County, Ohio, Court of Common Pleas. That case was also dismissed.

Trustees. (Pet. 18a-22a).

Lucas appealed to the Franklin County, Ohio, Court of Appeals, which affirmed the trial court's ruling on June 1, 1995. *Lucas v. Gee*, 104 Ohio App. 3d 423, 662 N.E.2d 382 (Franklin Cty. 1995) (Pet. 1a-10a). In its opinion, the court of appeals specifically held that Lucas's "first assignment of error regarding a denial of First and Fourteenth Amendment rights is not reviewable on this appeal as *plaintiff did not raise these questions in the trial court*." *Id.*, 104 Ohio App. 3d at 426, 662 N.E.2d at 384 (Pet. 4a) (emphasis added). The court of appeals also denied Lucas's subsequent motion for reconsideration (Pet. 11a-13a), and the Ohio Supreme Court denied Lucas's motion for discretionary review, *Lucas v. Gee*, 74 Ohio St. 3d 1418, 655 N.E.2d 738 (1995), and yet another motion for reconsideration, *Lucas v. Gee*, 74 Ohio St. 3d 1465, 656 N.E.2d 1300 (1995).

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONER DID NOT PROPERLY RAISE HIS CONSTITUTIONAL CLAIMS IN THE COURTS BELOW.

In his petition, Lucas's central proposition appears to be that *pro se* plaintiffs are entitled to "leeway" in their pleadings, particularly when federal constitutional rights are at stake, and that he therefore should have been permitted to proceed with a First Amendment claim against the respondents notwithstanding the serious shortcomings of his complaint. While perhaps unexceptional in the abstract, that proposition has nothing whatever to do with the facts of this case and is not properly before this Court.

As the courts below found, the facts stated in Lucas' complaint cannot fairly be stretched to encompass an

individual constitutional challenge to Ohio State's actions. Rather, what that complaint states, plainly and at considerable length, is simply that, at a meeting of the University Senate, Gee made a series of parliamentary rulings that Lucas believes to have "blatantly disregarded" Robert's Rules of Order in no fewer than 17 separate ways. (Pet. 49a-52a).

Nowhere in his lengthy and highly specific exposition did Lucas in any way mention the First Amendment or any other provision of federal law, nor can any such federal claims reasonably be read into his complaint by inference. As Lucas made clear from the very first paragraph of his complaint, the claims that he asserted were all *class* claims. Lucas's eleventh-hour assertion that he was deprived of his own First Amendment rights, on the other hand, was plainly personal and individual in nature. Moreover, Lucas's new-found claim was not even remotely connected to the relief that he sought. In his prayer for relief, Lucas asked only that the trial court invalidate certain votes taken at the Senate meeting "pursuant to Robert's Rules of Order" and enjoin Gee to comply with those rules in the future. (Pet. 52a). Such relief has nothing whatever to do with Lucas's supposed constitutional claim. Had he actually asserted such a claim, he could reasonably have been expected to have sought a corresponding remedy.[2]

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[2] In any event, contrary to Lucas's apparent beliefs, there is no constitutional right to filibuster. In *Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), this Court expressly held that, notwithstanding the First Amendment, "[p]lainly, public bodies may confine their meetings to specified subject matter." *Id.* at 175 n.8. Moreover, the applicable rules of parliamentary procedure specifically provide that a member of the Senate has no right to speak more than twice or for more than ten minutes total on any given issue, that a member cannot make a second speech on an issue until all other members who wish to do so have had an opportunity to speak once, and that, if it appears that a member is engaged in disruptive or obstructive behavior, the chair need not recognize him at all and may properly rule his motions out of order. The uncontroverted evidence below established that Gee acted in

The fact that Lucas is proceeding *pro se* makes no difference. Lucas did not properly raise that issue in the courts below, and it has never been expressly ruled upon. Indeed, until his motion for reconsideration in the court of appeals, he instead asserted that he possesses "proficiency in legal research and writing and a superior understanding of legal jurisprudence," that he is "vastly more qualified than the average layman," and that he therefore "possess[es] the skills necessary to prosecute the case." In any event, Lucas's petition amply demonstrates that he is in no need of any further "leeway" from the courts.

Finally, as even Lucas concedes, Ohio law on these issues is fully consistent with established federal standards. (Pet. 13-18). Indeed, Lucas himself argues that the Ohio Supreme Court and every federal circuit that has ever considered these issues are in complete agreement on the relevant law. (*Id.*). Accordingly, even if the court of appeals had misapplied Ohio law "contrary to the facts of this case" (Pet. 12), that factual "mistake" would not warrant this Court's review. This Court does not sit to determine whether the "ruling [of a mid-level Ohio court] conflicts with the decisions of the . . . Ohio Supreme Court." (Pet. 22).

II. PETITIONER LACKS STANDING TO ASSERT HIS REMAINING CLAIMS.

Apparently conceding that the vote of Ohio State's Board of Trustees to adopt the Student Code sexual harassment provision mooted his claim for retrospective relief, Lucas nevertheless continues to argue that he is entitled to injunctive relief "requiring [Gee] to comply with the Senate's rules of debate and procedure" in the future. (Pet. 29). Contrary to Lucas's assertions, however, there is

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accordance with these provisions at the April 9, 1994, Senate meeting.

no evidence whatever in the record to suggest that such "violations" are rampant at Ohio State, and Lucas, who is no longer a member of the Senate, cannot enforce the rights of current Senators in any event.

It is not enough for Lucas to assert a belief that a "law" may somehow be violated at some point in the future; "an asserted right to have the Government act in accordance with law is not sufficient." *Allen v. Wright*, 468 U.S. 737, 754 (1984). Rather, "a plaintiff . . . must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he would personally benefit in a tangible way from the Court's intervention." *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (emphasis in original; footnote omitted). "Past exposure to [allegedly] illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). In short, because Lucas is no longer a member of the Senate and has no right to participate in its future meetings,[3] "the requested relief [would not] aid [him] in the slightest," and he therefore lacks standing to pursue it. *Alexander v. Yale University*, 631 F.2d 178, 184 (2d Cir. 1980).

III. THIS COURT LACKS JURISDICTION TO INTERPRET STATE RULES OF CIVIL PROCEDURE.

Lucas's final Question Presented asks this Court to interpret a provision of the Ohio Rules of Civil Procedure

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[3] While meetings of the Senate are open to the public, visitors have no floor privileges. They may not introduce or vote on any matter before the Senate, and they may speak only upon invitation and upon such terms and conditions as the Senate, in its discretion, may set. In any event, Lucas has attended only a single meeting of the Senate in the nearly two years since his term expired and, even then, made no effort to participate.

and to hold that the Ohio courts applied it improperly in this case. That issue, which Lucas *never* raised below, is purely a matter of state law and is not within the scope of this Court's jurisdiction.

IV. THERE IS NO "SPECIAL AND IMPORTANT REASON" FOR THE COURT TO HEAR THIS CASE.

For the reasons stated above, there is no federal question at all in this case, let alone a substantial one. Moreover, Lucas does not claim that there is any conflict at all among the courts on the legal issues that he considers relevant. Rather, this case presents, at most, an alleged factual error by a mid-level state court in applying a state law standard that, as even Lucas himself concedes, is in full accord with widely established federal law.

Moreover, the internal workings of a purely advisory university body are of little consequence either within or outside of the ivory tower. Indeed, the issue is of no real consequence even to Lucas. Notwithstanding his professed concern for the integrity of Senate proceedings, Lucas has attended only a single meeting of the Senate in the nearly two years since his term expired, and did so then only after his lack of interest became an issue in the Ohio Supreme Court. He has pursued this lengthy litigation for strictly vindictive reasons.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 95-1737

IN THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 1995

VINCENT A. LUCAS

Petitioner,

v.

E. GORDON GEE, et al.

Respondents.

On petition for writ of certiorari to the Court of Appeals for Franklin County, Ohio

PETITIONER'S REPLY BRIEF

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Argument

1. The Respondents' Brief in Opposition demonstrates exactly why certiorari should be granted. For, although they summarily claim that "the facts stated in Lucas' complaint cannot fairly be stretched to encompass a[] [First Amendment] challenge,"[1] they never explain why the *facts* from the Complaint are supposedly not sufficient to state a First Amendment claim. They never explain what key factual elements necessary to a First Amendment case the Complaint supposedly fails to allege, nor what additional facts the Petitioner could have possibly alleged to cure the supposed "shortcomings" of his Complaint. Indeed, the Respondents' Brief has more to say about the Petitioner's choice of postage stamps than it does about what facts his Complaint is supposedly lacking.

In lieu of actual argument to support their claim that the Petitioner failed to allege sufficient facts to state a constitutional claim, the Respondents offer an incoherent hodgepodge of theories as to why the Complaint should have been dismissed. Their theories are utterly without merit:

The Respondents' argument that the prayer for relief "was not even remotely connected" to his First Amendment claims is without merit. This argument was treated in great detail in footnote 22 of the Petition (p. 24-5). In short, the relief sought (which included an injunction which would have required Gee to conduct future Senate meetings according to the Senate's largely content-neutral rules of debate) was perfectly appropriate and would have remedied the First Amendment claims by preventing First Amendment deprivations like those described in the Complaint from occurring again; and even if there were an inconsistency between the Petitioner's First Amendment claims and the relief sought, such inconsistency would be irrelevant to whether the Complaint states a claim, since, under established Ohio and federal law, "[t]he sufficiency of a pleading is tested by the statement of the claim and the demand for judgment is not considered part of the claim." 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil 2d (1990) § 1255.

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[1] Opp. 6-7 (emphasis added)

Respondents' argument that the Petitioner's First Amendment claims are not consistent with the Complaint's original status as a class action is even more meritless. Gee's rulings were not just that the *Petitioner* could not debate the constitutionality of the proposed Code change and not just that the *Petitioner* could not debate the merits of Petitioner's amendment thereto but that *none* of the senate members could. Indeed, Complaint ¶ 8(f) alleges "Gee ... ruled that any debate on the legality under the U.S. Constitution of the [proposed Code change] was out of order," not just debate by the Petitioner.[2,3] (emphasis added). Thus, all Senate members had similar First Amendment claims against Gee.

Despite the fact that all would-be class members have similar First Amendment claims against Gee, the Respondents apparently believe that First Amendment claims are inherently so "personal and individual in nature" that First Amendment claims can not be pursued in a class action. They cite no authority in support of their position, and their argument is contrary to the plain requirements of Ohio R. Civ. P. 23(B). The fact that the Respondents would now raise such an absurd argument shows how unsound the court of appeals' ruling was.

Finally, it is clear that the Respondents' only real objection to the Complaint of any arguable merit is that "[n]owhere in his [Complaint's] lengthy and highly specific exposition did Lucas in any way mention the First Amendment or any other provision of federal law..." (Opp. 7) -- in other words, the Petitioner did not allege the correct legal theory for his action --- a ground which the Ohio Supreme Court as well as "*every federal circuit*

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[2] Similarly, Complaint ¶ 8(h) alleges "Gee ... did not allow debate on an amendment to [the Code change] ..." and not that Gee did not allow debate just by the Petitioner.

[3] Similarly, The Lantern, a newspaper published by Ohio State, describes the ruling as being one where nobody was allowed to debate the constitutionality of the policy, not just the Petitioner. " 'The constitutionality *can not be debated today*,' Gee said. 'At this point, it is assumed that the policy is constitutional.' " *Id.*, Apr. 11, 1994 (emphasis added) (Lucas 4th Aff. ¶ 4 Ex. 2) (App. 1).

that has ever considered [the] issue"[4] has held is not a valid ground for dismissing a Complaint.[5,6]

2. The Respondents' standing arguments are based on factual premises that have changed considerably since their brief was written. Contrary to their brief, the Petitioner HAS participated in Senate debates since he lost his position as a senator. *See* Petitioner's Supplemental Brief on the Issue of Standing. Also contrary to their brief, the Petitioner has attended three Senate meetings as a non-senator, not just one. For the reasons stated in Petitioner's Supplemental Brief, these facts amply demonstrate the Petitioner's standing in this case.

3. Contrary to what the Respondents' have implied, the Petitioner has never stated or implied that he should not be accorded the benefit of the full liberal treatment any other non-lawyer would be entitled to. To start with, the Petitioner has *never* argued in the court of appeals that he is in any way more qualified to prosecute this case than any other layman. Also contrary to their brief (Opp. 8), the Petitioner maintained consistently during the proceedings in the court of appeals that he was entitled to leeway in the construction of his pleadings because is a non-lawyer. Pet. 8 n.11.

Furthermore, the quotes in Opp. 8 are taken grossly out of context. Those passages come from the Petitioner's Reply Memorandum in Support of Class Certification. In that memorandum, the Petitioner, who was unaware of the Civil Rules' implicit requirement regarding the competency of a class

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[4] Opp. 8 (emphasis added)

[5] Precisely because the legal theory of recovery alleged in the Complaint is not relevant in determining whether a Complaint states a claim, it is irrelevant that the Complaint's prayer asks certain votes to be declared void "pursuant to Robert's Rules of Order" (Opp. 7) as opposed to "pursuant to the First Amendment" or some other provision of federal law.

[6] Contrary to Opp. 7 n.2, the Petitioner has never claimed to have a "constitutional right to filibuster." Moreover, nothing in Robert's Rules of Order or the Senate's rules of procedure allows Gee to exclude at his sole discretion any subject of debate, even if relevant to the proposals being considered by the Senate, or to choose what amendments by which senators will be afforded Senate debate, and even if it did, it would be superseded by the First Amendment.

representative's counsel at the time he filed his motion for class certification, argued to the trial court, in an effort to save his motion for class certification, that the court should "grant class certification on the condition that [Petitioner] obtain an attorney within some period of time" specified by the court. *Id.* at 12. The Petitioner also suggested that the court may wish to consider allowing the Petitioner to represent the class on a tentative basis and "appointing additional counsel" if Petitioner could not handle the task. *Id.* at 10. Petitioner's arguments were based largely on his mistaken belief that this case would be "a rather simple one" requiring "little discovery" that would not involve any complex legal issues, and which could be "readily resolved" simply by listening to the tapes of the Senate meeting and looking to "Robert's Rules of Order" to see if "the defendants violate[d] the law." *Id.* at 7, 10. The Petitioner did argue in that memorandum, and that memorandum only, that because he had some familiarity with "legal research and writing" that he was "more qualified than the prisoners who were the subjects of most of the citations relied on by the defendants" in their Memorandum in Opposition to Class Cert., and, because the case was a simple one that could be easily resolved by looking to "Robert's Rules of Order," the Petitioner might "possess[] the skills necessary to prosecute the case," and if not, the court could "cure [any] defect in the representation by appointing additional counsel when it seems appropriate." *Id.* at 10, 12

In retrospect, the decision to deny class certification was a wise one. This case has involved legal issues vastly more complicated than those contemplated by the Petitioner when he filed his reply brief supporting class certification. Moreover, without any leeway from the court, even a "vastly" above average layman is usually no match for a lawyer in a court of law. "Even the intelligent and educated layman has small and sometimes no skill in the science of law." *Powell v. Alabama,* 287 U.S. 45, 68-9 (1932). In fact, the Petitioner could only claim that he might be able to adequately prosecute this case *precisely because* he was anticipating from the trial court leniency because of his complete lack of legal training.

In any event, the Petitioner's Motion for Class Certification was denied over a month before the trial court's ruling

dismissing the case. After class certification was denied, it no longer mattered whether the liberal treatment the Petitioner was entitled to as a non-lawyer might not have been fully consistent with the Petitioner's statement that he might be able to prosecute this case adequately.

4. Contrary to Opp. 9-10, this court does have jurisdiction to review Petitioner's Question Presented No. 5. In *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877), this Court stated

> [D]ue process [requires that] ... [t]o give [judicial] proceedings any validity, there must be a tribunal competent by its constitution -- that is, by the law of its creation -- to pass upon the *subject-matter* of the suit ...

(emphasis added). The trial court dismissed the Complaint "with prejudice" although the trial court and court of appeals expressly found that the trial court lacked subject-matter jurisdiction over the only claims the court of appeals perceived had been properly raised. As *Pennoyer* makes clear, a court denies due process when it dismisses on the merits claims it determines it has no subject-matter jurisdiction to consider. Because the dismissal "on the merits" denies federal due process rights, this Court has jurisdiction to consider the issue.

The other Questions Presented for Review are also properly before this Court. Pet. 1 (whether a pleading sufficiently pleads a federal claim is a federal question); Pet. 7-9, 8 n. 11 (argument regarding leniency afforded *pro se* pleaders is properly before this Court). The Respondents' unsupported statements to the contrary merit no additional argument.

5. There are "special and important reasons" for granting certiorari in this case.

A. While arguing that this case presents no special and important reason for granting review because all the federal courts and the Ohio Supreme Court are in agreement on the issue of whether a complaint needs to allege the legal theory on which the action is based, the Respondents completely ignore the Petitioner's arguments regarding the national importance of a ruling by this Court regarding what leniency state courts must give *pro se* litigants when pleading federal claims. This case presents this Court with a unique opportunity to resolve the very

disturbing, ever-growing split of authority among the state courts regarding this issue. This Court will eventually have to resolve this split of authority anyway; it might as well do so now. Resolving this issue now will benefit countless thousands of litigants and will rectify a true miscarriage of justice in the instant case as well. Contrary to the Respondents' claims, Ohio law on the issue of the liberality afforded to *pro se* litigants is not "in full accord with widely established federal law"[7] and certainly is not in accord with federal law as applied to the Petitioner.

That the court of appeals did not expressly state in its ruling that the Petitioner was not entitled to more liberal treatment as a non-lawyer is of little, if any, relevance. In almost all of the cases in which this Court has considered this issue, the lower court of appeals also did not expressly mention the issue of the liberality to be afforded to a *pro se* litigant. *Haines v. Kerner,* 404 U.S. 519 (1972); *Hughes v. Rowe,* 449 U.S. 5 (1980); *Boag v. MacDougall,* 454 U.S. 364 (1982). It was only after an examination of the facts in those cases that this Court determined that the pleaders had not been afforded the leeway they were entitled.

B. This Court should also grant certiorari because of the clear conflict between the court of appeals' ruling and this Court's rulings in *Conley v. Gibson,* 355 U.S. 41 (1957); *Haines v. Kerner* and other cases. Contrary to the Respondents' beliefs, a clear conflict between a ruling sought to be reviewed and the rulings of this Court has always been considered a "special and important reason" for granting certiorari, regardless of whether a ruling on the case would resolve any split of authority among the lower courts. *See* Supreme Court Rule 10(c). Indeed, many commentators have noted that a direct conflict between an appellate court ruling and the

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[7] E.g., one Ohio appellate court has held "Appellants' argument that as *pro se* civil litigants they should receive special consideration ... is against the weight of Ohio as well as national authority. *Pro se* civil litigants are bound by the same rules and procedures as those litigants who retain counsel." *Meyers v. First Nat'l Bank,* 444 N.E.2d 412, 413 (Hamilton Co. 1981). However, there are examples of Ohio appellate rulings to the contrary. To the Petitioner's knowledge, the Ohio Supreme Court has never ruled definitively on this issue.

decisions of this Court is "one of the strongest possible grounds for securing the issuance of a writ of certiorari." Stern, et al., Supreme Court Practice (7th ed. 1993) § 4.5.

> In *Conley v. Gibson, supra* at 45, this Court stated
> a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

The utter inability of the Respondents to explain what facts are supposedly missing from the Complaint to state a First Amendment claim demonstrates that there is a clear conflict between the court of appeals ruling and *Conley v. Gibson.* Indeed, none of the lower courts have *ever* stated why the facts in the Complaint are supposedly insufficient to state a First Amendment claim --- thus depriving the Petitioner of any meaningful opportunity to amend his Complaint pursuant to Ohio R. Civ. P. 15(A) to cure the supposed "defect".[8]

Given that at least *eleven of twelve* regional federal court of appeals circuits have held that a pleader need not plead the legal theory for his action, the Court should also grant certiorari to enforce widely established federal law on this issue. Contrary to Opp. 6, the court of appeals ruling cannot be fairly construed as a ruling that the Petitioner did not plead sufficient facts to state a claim; the ruling was not that the Petitioner did raise his First Amendment questions in the trial court but failed to allege sufficient facts in his Complaint to pursue his First Amendment claim, but instead the court could not review whether the "trial court erred in dismissing the First ... Amendment" claims purportedly because that his First Amendment claims *had not even been raised properly* in the trial court. But why? The Complaint plainly alleges that Petitioner was deprived his rights

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[8] *See Ballou v. General Electric Co.*, 393 F.2d 398, 400 (1st Cir. 1968) ("[I]f a complaint is dismissed for failure to state a claim ... for their guidance in amending, plaintiffs should also be informed of the reason" the complaint was held insufficient); *Bonanno v. Thomas*, 309 F.2d 320, 322 (9th Cir. 1962) ("Where a complaint is dismissed on the ground that it fails to state a claim, the order should also inform the plaintiff of the reason for dismissal so that he can make an intelligent choice as to amending."); *Buchler v. U.S.*, 384 F.Supp. 709, 714 (E.D. Cal. 1974)

to speak at the Senate meeting[9] and the Petitioner raised at numerous times in his memoranda opposing dismissal in the trial court his First Amendment legal theory.[10] The only way the court of appeals' ruling can be reconciled with the facts of this case, if it can be reconciled at all[11], is if the court of appeals believed that a First Amendment claim is not properly raised unless the Complaint alleges that the legal theory on which the pleader relies involves the First Amendment -- a ground which *every federal circuit that has ever considered the issue* has held is not a valid reason for dismissing a Complaint.

Conclusion

Certiorari should be granted. This case is appropriate for summary reversal.

Respectfully submitted,
VINCENT A. LUCAS
Petitioner, pro se

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[9] *See* Pet., Reasons for Granting the Writ, Sec. I, Subsec. B.

[10] Pet. App. 26a-31a.

[11] Remarkably, when read literally, the court of appeals' ruling holds that the Petitioner *never even raised his First Amendment arguments in the trial court*, although he plainly did in his memoranda opposing dismissal (Pet. App. 26a-31a), as was pointed out to the court of appeals numerous times throughout the proceedings in that court (Pet. App. 34a-37a).

By Amy Schafer
Lantern staff writer

Despite strong opposition, the University Senate approved revising the Code of Student Conduct's sexual harassment policy Saturday.

The proposal to revise the code was sponsored by the Council on Student Affairs, and it was presented by Kathleen Carberry, chairwoman of the council.

Carberry said the revision will make the Code of Student Conduct consistent with the sexual harassment policy as approved by the Board of Trustees.

"Students need the benefits of a consistent policy," she said.

Chris Smith, USG commuter representative, agreed that the university needed a uniform policy, but objected to the policy because of its vagueness.

Those opposed to the revision thought the policy was unconstitutional, and that students did not have adequate input into the revision process.

The question of constitutionality was raised by USG member Chris Meade, who said the policy seemed so broad, he could be brought up on charges for almost anything.

"I would hate to tell a joke that could be overheard by someone who was offended, and then be brought up on charges," Meade said.

OSU professor and faculty council member Harry Allen said

Meade's concerns were only interpretations of the policy, and that one cannot bring all legal interpretations of a policy into the debate.

University President E. Gordon Gee agreed, saying people will

> *"It's not really clear what the legal consequences are. It's a messy situation."*
>
> — David Goldberger

debate the constitutionality of the policy, but the debates should be done in the courts.

"The constitutionality can not be debated today," Gee said. "At this point, it is assumed that the policy is constitutional."

Another objection to the policy came from Rob Edmund, USG assembly speaker, who said many USG members needed time to discuss the revision with their constituents.

Edmund made a motion to

See POLICY/Page two

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Petitioner,

v.

E. GORDON GEE, et al.

Respondents.

On petition for writ of certiorari to the Court of Appeals for Franklin County, Ohio

PETITIONER'S SUPPLEMENTAL BRIEF ON THE ISSUE OF STANDING

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HPP

On May 4, 1996, Ohio State's University Senate met. During that meeting, the Petitioner made a request to participate in the Senate's debate, was granted that request, and participated in the Senate's debate, as is evidenced by the affidavit that follows. No objection was made against the Petitioner's participation in Senate debate.

The fact that the Petitioner was able to participate in the Senate's debate irrefutably demonstrates that the trial court was correct in finding that, as a member of the university community, the Petitioner continues to have standing to pursue this case, even though he is a non-senator: The University Senate has an informal tradition of letting anyone from the university community participate in its debates. As such, the Petitioner is concretely and tangibly harmed by Gee's practices in presiding over Senate debate, as he clearly would have been had Gee decided at the Senate's May 4 meeting to use his power as presiding officer to prevent his political opponents from discussing their views, like he has at times in the past[1]. Hence, the Petitioner has a concrete, tangible stake in the outcome of litigation to enjoin Gee's practices in presiding over Senate debate. Thus, the Petitioner continues to have standing in this case.

Respectfully Submitted,
VINCENT A. LUCAS
Petitioner, pro se

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[1] *See* Complaint ¶¶ 8(f),(h); 9(c). *See generally* Petition for Certiorari, Reasons for Granting the Writ, Section I, Subsection B.

No. 95-1737

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Respondents.

AFFIDAVIT OF VINCENT A. LUCAS

STATE OF OHIO)
COUNTY OF FRANKLIN) ss.

Vincent A. Lucas, being duly sworn, says that:

I am Vincent A. Lucas and I have personal knowledge of the facts herein set forth.

1. On May 4, 1996, a meeting was held of the University Senate ("Senate") of the Ohio State University.

2. During that meeting, Grady Chism gave a report on behalf of the Senate's Committee on Women and Minorities. After the report followed a period for discussion and debate by the Senate on the report. During that period of discussion and debate, I requested that I be recognized by the Senate to participate in the discussion, was recognized for that purpose, and used my opportunity to participate in Senate debate to ask the following question:

> Um yes, do you think that our affirmative action programs have had a significant impact in terms of increasing the opportunity for um-, the equality of opportunity, for um-, between gender and races, and do you think that it would

get any worse or better if we simply got rid of the affirmative action programs such as has been proposed say in California.

Chism then proceeded to answer my question.

No objection was made against my speaking at the Senate meeting. Nothing unusual happened in conjunction with either my request to participate in Senate discussion or my subsequent participation in the Senate discussion. Having been recognized to address the Senate, my participation was treated no differently by the Senate or its members than would participation by any member of the Senate.

3. The request to participate in Senate discussion and debate described in the paragraph above was the first and only time I have made a request to participate in Senate discussion or debate as a non-senator.

Vincent A. Lucas

Sworn unto me and subscribed in my presence this 21st day of May, 1996.

Notary, State of Ohio

ANTHONY T. FIDELIBUS
Notary Public, State of Ohio
My Commission Expires 6-19-99